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Case No.

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA,
Petitioner,

v.

BLAINE ROSS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Petitioner asks this Court to grant review of the following issue:

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBILITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

I. 15

THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, SHOULD AFFORD A PRESUMPTION OF ADMISSIBILITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT.

CONCLUSION 34

OPINION OF THE FLORIDA SUPREME COURT..... A1-A90

TRIAL COURT ORDER ON MOTION TO SUPPRESS A91-A179

MIRANDA WAIVER FORM A180

TABLE OF AUTHORITIES

Federal Cases

Ford v. United States,
931 A.2d 1045 (D.C. Cir. 2007),
cert. denied, 533 U.S. 1026 (2008) 18

Marks v. United States,
430 U.S. 188 (1977) 24

Miranda v. Arizona,
384 U.S. 436 (1966) ..... passim

Missouri v. Seibert,
542 U.S. 600 (2004) ..... passim

Oregon v. Elstad,
470 U.S. 298 (1985) ..... passim

United States v. Briones,
390 F.3d 610 (8th Cir. 2004),
cert. denied, 545 U.S. 1122 (2005) 18

United States v. Carrizales-Toledo,
454 F.3d 1142 (10th Cir.),
cert. denied, 549 U.S. 1065 (2006) 18

United States v. Carter,
489 F.3d 528 (2d Cir. 2007),
cert. denied, 128 S. Ct. 1066 (2008) 17

United States v. Courtney,
463 F.3d 333 (5th Cir. 2006) 18

United States v. Crisp,
371 Fed. Appx. 925 (10th Cir. 2010)
(unpublished) 22

United States v. Fellers,
397 F.3d 1090 (8th Cir.),
cert. denied, 546 U.S. 933 (2005) 19

United States v. Gonzalez-Lauzan,
437 F.3d 1128 (11th Cir.),
cert. denied, 549 U.S. 861 (2006) 18, 19

United States v. Heron,
564 F.3d 879 (7th Cir. 2009) 19

United States v. Jackson,
608 F.3d 100 (1st Cir. 2010),
pet. for cert. filed Sept. 2010 19

United States v. Mashburn,
406 F.3d 303 (4th Cir. 2005) 18

United States v. Naranjo,
223 Fed. Appx. 167 (3d Cir.)
(unpublished decision after remand),
cert. denied, 552 U.S. 1055 (2007) 22

United States v. Naranjo,
426 F.3d 221 (3d Cir. 2005) 17

United States v. Ollie,
442 F.3d 1135 (8th Cir. 2006) 21, 22

United States v. Pacheco-Lopez,
531 F.3d 420 (6th Cir. 2008) 18

United States v. Stewart,
388 F.3d 1079 (7th Cir. 2004) 19

United States v. Stewart,
536 F.3d 714 (7th Cir.),
cert. denied, 129 S. Ct. 741 (2008) 21, 22

United States v. Street,
472 F.3d 1298 (11th Cir. 2006),
cert. denied, 551 U.S. 1138 (2007) 18

United States v. Verdugo,
___ F.3d ___, 2010 WL 3260805
(1st Cir. Aug. 19, 2010) 19

United States v. Williams,
435 F.3d 1148 (9th Cir. 2006) 18, 21

State Cases

Carter v. State,
309 S.W.3d 31 (Tex.Crim.App. 2010) 18, 21, 22

Davis v. State,
990 So. 2d 459 (Fla. 2008) 13, 19

People v. Lopez,
892 N.E.2d 1047 (Ill. 2008),
cert. denied, 129 S. Ct. 998 (2009) 18

People v. Rios,
101 Cal.Rptr.3d 713 (Cal. 2009) 18

Ross v. State,
35 Fla. L. Weekly S295 (Fla. May 27, 2010). passim

State v. Fleurie,
968 A.2d 326 (Vt. 2008) 18, 19

State v. Gaw,
285 S.W.3d 318 (Mo. 2009),
cert. denied, 130 S. Ct. 1082 (2010) 18

State v. Hickman,
___ P.3d ___, 2010 WL 3555802 (Wash. 2010) 18

Other Authorities

28 U.S.C. § 1257(a) 2

Daniel S. Nooter, Note, Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda,
42 Am.Crim. L.Rev. 1093 (2005) 21

Sup. Ct. R. 10(b) 22

Sup. Ct. R. 10(c) 23

Case No. _____

IN THE UNITED STATES SUPREME COURT

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BLAINE ROSS,
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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Ross v. State, 35 Fla. L. Weekly S295 (Fla. May 27, 2010), as revised on September 8, 2010 (35 Fla. L. Weekly S501).

Petitioner's Appendix (A1-A180) contains the opinion of the Florida Supreme Court below, Case No. SC07-2368, (A1-A90). The Appendix further contains the trial court's order denying the motion to suppress (A91-A179) and the Miranda Waiver Form (A180). The parties will be referred to as they appear before this Court or as they stood in the court(s) below. [1]

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[1] The symbol; "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person** be subject for the same offence to be twice put in jeopardy of life or limb; nor shall **be compelled in any criminal case to be a witness against himself,** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In 2007, Respondent Blaine Ross was convicted of robbery and two counts of first degree murder following the deaths of his parents, Richard and Kathleen Ross. Ross was arrested for the murders on January 9, 2004, after extensive questioning which started as a noncustodial interview at approximately 3:35 p.m. The trial court found that the interview became custodial so as to require warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), at 7:22 p.m., when Manatee County Sheriff's Detective William Waldron advised Ross of his constitutional rights and secured a written acknowledgment and waiver of rights (A180). The Florida Supreme Court disagreed and concluded that Ross was in custody two hours earlier, as of 5:20 p.m., when Waldron confronted Ross with the fact that his parents' blood had been found on a pair of his pants that had been collected from his girlfriend's house on January 8, 2004. Ross, 35 Fla. L. Weekly at S299 (A26). At issue in this petition is the propriety of the Florida Supreme Court's analysis and conclusion that Ross's statements following the execution of his written waiver of rights should have been excluded under this Court's decision in Missouri v. Seibert, 542 U.S. 600 (2004).

A. TRIAL

On January 7, 2004, Blaine Ross called 911 to report the discovery of his parents' bodies in the bedroom of their home in Bradenton, Florida. Law

enforcement officers with the Manatee County Sheriff's Office responded to the scene, and found Ross, 21-years-old, and his 16-year-old girlfriend, Erin, waiting outside the Ross home. At Ross's request, law enforcement transported him away from the scene to be interviewed.

Ross then spent about twelve hours at the Manatee Sheriff's substation, during which time he gave four separate interviews that amounted to a total of less than four hours. Ross was not advised of his Miranda rights but when he challenged the admission of these statements, the courts determined that there was no custodial interrogation so the statements were properly admitted. Ross, 35 Fla. L. Weekly at 297, n.7 [note at 309] (A14). In the interviews, Ross attempted to describe his actions over the previous few days but he admitted that his memory was poor as he had ingested illegal substances which interfered with his recall ability. Ross made a number of inconsistent, improbable, and implausible statements over the course of these interviews. He was repeatedly accused of having killed his parents but he consistently denied having done so. Ultimately, the questioning concluded and Ross was driven to his girlfriend's house about 2:40 a.m. on January 8.

On January 9, Ross returned to the sheriff's office seeking information about getting victim's assistance as well as the status of the investigation. The January 9 meeting between Ross and Det. Waldron was videotaped and admitted as evidence at trial. The tape opens with Ross and Waldron

discussing questions which Ross had based on media coverage he had seen about his parents' murders and some aspects of the investigation. After answering Ross's questions, Waldron asks if they could go back over the information they had been discussing on January 7 and 8 regarding Ross's actions before discovering his parents' bodies. Ross is offered a bathroom or smoke break and something to drink, but he declines. The time is 3:35 p.m. About half an hour later Ross and Waldron left the room for a cigarette break, and the interview is resumed at 4:33. Around 5:00 the interview becomes more heated, with Waldron repeating suspicions he had raised in the earlier interviews and Ross insisting that, while he did not remember details about his activities, he could not have committed the crimes. At 5:20, Waldron tells Ross that his pants that were collected from Erin's house had spots of blood on them that matched blood from the crime scene. About fifteen minutes later, Ross admits that it was possible he committed the crime with no memory of his actions, but that he did not believe he had done so.

A few minutes after 6:00, Ross asks to see his sister, and Waldron leaves the room so that Ross and his sister can speak alone. On the video, Ross's sister advises him to tell the truth, but not to let the police talk him into believing that he had done something that he did not do. Waldron returns and the interview resumes at 6:23 but is halted when Waldron leaves the room again shortly before 7:00. Waldron returns at 7:16 but leaves when Ross requests to speak to his sister again. Waldron returns five minutes later saying that he couldn't

find Ross's sister, but there were some other things he had learned, and they needed to go over some "procedures." Waldron then advises Ross of his constitutional rights, which were discussed briefly before Ross agreed to continue answering Waldron's questions. Ross signed a written waiver acknowledging his rights, and indicated, both orally and in writing, that he was willing to continue speaking with Waldron. Waldron proceeded to tell Ross that the police had discovered a bloody ski mask in his car, and Ross told Waldron that there was an innocent explanation for the mask. In fact, the mask did not incriminate Ross and was not admitted as evidence against him at the trial. At 7:54, Ross acknowledged knowing that he "did do this," telling Waldron that he recalls standing at the foot of his parents' bed with a bloody baseball bat in his hands. Ross admitted realizing what he had done and attempting to stage the scene to look like a burglary. He stated that he took his mother's purse and that, ultimately, he threw the purse, the baseball bat, and his bloody shirt off of a bridge. Ross continued to answer questions until 8:48, when he expressly invoked his right to remain silent.

It is undisputed that, at some point in this interview, the questioning became custodial; the trial court determined that custody occurred at approximately 7:22 p.m., when Det. Waldron advised Ross of his constitutional rights pursuant to Miranda, while the Florida Supreme Court determined that the interrogation had become custodial about two hours earlier, once Waldron confronted Ross with the fact that law enforcement

had detected blood on a pair of Ross's pants that had been collected from Erin's house and matched blood from the crime scene.

Several days after the arrest, Ross's sister contacted Waldron and advised him that Ross wanted to talk to him. Waldron spoke to Ross at the jail cell on January 12, and after receiving Miranda warnings again, Ross made further inculpatory statements. In addition to Ross's statements of January 7, 8, 9, and 12, the State presented evidence at trial indicating that Ross had been present at the scene. Specifically, Erin testified that Ross had not been at her house when she went to sleep on January 6, but he had been there when she woke up on January 7. Ross's fingerprint was found on a cigarette lighter which had been left on top of a baseball equipment bag in the garage of the house; the compartment for bats was unzipped and empty. Another fingerprint was found on the inside of a sliding glass door that had been left ajar. In addition, blood with his parents' DNA was found on the pants Ross had been wearing the night of the murder, which were collected at Erin's house the next day.

Evidence was also offered to establish a financial motive for the murders. Testimony and bank records showed that Ross had withdrawn a total of $1401.50 from his mother's checking account over a short period of time before her murder; a written contract dated January 6, 2004, between Ross and his mother stated, "I, Kathleen Ross, has [sic] loaned Blaine Ross $1400 that will be paid back

in full as soon as possible. Blaine will never ask for Sam's Club card or any other money."

The murders were estimated to have occurred between 3 a.m. and 5 a.m. on January 7. After Ross and Erin woke up at Erin's house on January 7, they went to a credit union where Ross attempted to withdraw money with an ATM card. When he was unable to obtain money, Ross went into the credit union to speak with an employee to have her access the account. When told that the account was only in his mother's name, Ross told the employee that his mother was out of town and he needed the PIN number. Although Ross was insistent, the credit union employee refused to give Ross access to the account. After leaving the credit union, Ross attempted to use the ATM card at another location but was still unable to obtain any money. At that point, Ross returned to his parents' house, ostensibly to talk to his mother about getting money, and that is when he discovered his parents' bodies.

At Ross's trial, the January 9 videotape was admitted and published, along with audiotapes of the January 7, 8 and 12 interviews. Ross presented defense witnesses in an attempt to establish that his confession was unreliable and that someone else had committed the murders. Ross was convicted as charged and, following a penalty phase proceeding, his jury recommended that two death sentences be imposed for the first degree murder convictions. The trial judge complied and sentenced Ross to death for the murders.

B. PRETRIAL SUPPRESSION HEARING

Ross filed written motions to suppress physical evidence which had been gathered as well as his statements to law enforcement officers on January 7 and 8, January 9, and January 12. A series of pretrial hearings were conducted in 2006 to address the constitutional issues raised in Ross's motions. The testimony regarding the circumstances of Ross's statements of January 9 was provided primarily by Det. Waldron and the defense confession expert, forensic psychologist Dr. Gregory DeClue. Ross did not testify.

Evidence was presented that the Manatee County Sheriff's Office formal policy required officers to provide Miranda warnings to any suspect before questioning either upon arrest or when the questioning passes from the fact-finding process to the accusatory stage. Det. Waldron testified that his training on interviews and interrogations taught him to provide Miranda warnings at the point where a person's movements are restricted and the person is not going to be free to leave. Waldron stated that the office policy was just a guideline and that, depending on the situation, some interviews became accusatory before the warnings were given. Waldron acknowledged that, before he spoke to Ross, he discussed the case with his supervisors and had been given suggestions on how to proceed. Manatee County Sheriff Charlie Wells had offered some advice before the January 9 interview and indicated that he was counting on Waldron to get "closure." Waldron also was aware that Wells and others were

monitoring the interview as it took place. When asked why he did not provide Ross with Miranda warnings earlier than he did, Waldron explained that he did not believe that he had probable cause to arrest Ross until he learned about the ski mask, which he believed would incriminate Ross.

Following the hearing, the trial court rendered an extensive order addressing numerous aspects of Ross's multiple statements. The court agreed with Det. Waldron that Ross was not in custody prior to the time that Waldron advised him of his rights and secured a written acknowledgment and waiver (A139-A153). The court described the January 9 interview, finding "[a]lthough there are portions of the interview that are confrontational and indeed pointed and accusatory, most of the interview was overtly non-confrontational and overtly conversational," (A145-A146) and "the majority of the conversation was cordial and particularly non-accusatory" (A148). The court also expressly found that there was "no evidence that the detectives deliberately withheld Miranda until the defendant confessed" (A152). In response to Ross's claim of involuntariness, the trial court found that "[t]here is nothing in the interviews that indicate that Defendant was coerced or intimidated into confessing to this crime" (A162).

C. THE FLORIDA SUPREME COURT OPINION

In a split 4-3 decision, the Florida Supreme Court concluded that Ross was actually in custody at the point where Waldron confronted him with the fact that blood from the crime scene had been found on the pants that he had left at Erin's house the morning of the murders, and determined that Miranda warnings should have been given at that time. The court also held that the failure to provide timely warnings and the manner in which the warnings were delivered rendered them ineffective, and, pursuant to this Court's Seibert decision, suppression of Ross's post-Miranda statements was also required. The court noted that the circumstances of the confession were "uncontroverted," and determined that the State had failed to establish that Ross's waiver had been knowingly, voluntarily and intelligently made, and that therefore the post-waiver statements should have been suppressed.

The dissenting justices agreed that Ross was in custody for Miranda purposes when confronted with the bloody pants, but concluded that the statements following Ross's written waiver of rights were properly admitted. The dissenters expressly disagreed with the majority's application of Seibert, noting that, since there was no evidence of a deliberate, two-step strategy to avoid Miranda, the standards of Oregon v. Elstad, 470 U.S. 298 (1985), should control. Because the record affirmatively demonstrated that Ross's pre-warning statements were voluntary, and that Waldron fully explained

Ross's rights before securing the written acknowledgment and waiver, Ross's post-warning statements were properly admitted. The dissenting opinion also concludes that the error in admitting Ross's statements after he was confronted with blood on his pants but before being provided with the warnings was harmless beyond any reasonable doubt. Therefore, the dissenting justices would have affirmed Ross's convictions despite admission of the January 9 videotape.

REASONS FOR GRANTING THE WRIT

Since the release of Missouri v. Seibert, 542 U.S. 600 (2004), both federal and state courts have struggled to apply the fragmented decision. The Florida Supreme Court opinion issued below reflects the difficulty which has been noted in a number of cases attempting to enforce Seibert. The Florida court itself disagreed on the proper application of Seibert and the appropriate standards to be assessed under the factual situation presented, with the three dissenting justices concluding "[t]he majority is improperly mixing the [Oregon v.] Elstad [470 U.S. 298 (1985)] and Seibert standards together." Ross, 35 Fla. L. Weekly at 307 (A79). The majority opinion itself recognized that "there is a split in the federal circuits regarding whether the plurality rather than [Justice Kennedy's] concurrence operates as the controlling precedent." Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37). While the Florida Supreme Court has previously applied Justice Kennedy's concurring opinion as the operative rule, see Davis v. State, 990 So. 2d 459 (Fla. 2008), the analysis conducted in the instant case signals a clear retreat from that position. Below, the Florida court conflagrated Elstad and Seibert, concluding that both support the "application of a totality of the circumstances analysis when warnings are delivered midstream during an ongoing interrogation." Ross, 35 Fla. L. Weekly at 301 (A41). However, Justice Kennedy's opinion in Seibert rejects the suggestion that a Miranda violation in connection with one statement necessarily threatens the admissibility of other statements taken in full compliance with

Miranda, noting "[I]t would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning." Id. at 620. The Florida Supreme Court opinion below failed to limit its Seibert application to Justice Kennedy's narrower opinion, and accordingly improperly directed a new trial be held and that Ross's voluntary, post-Miranda statements be excluded.

I.

THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, SHOULD AFFORD A PRESUMPTION OF ADMISSIBILITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT.

In Oregon v. Elstad, 470 U.S. 298, 310-11 (1985), this Court held that where a properly-warned confession is preceded by an unwarned but clearly voluntary admission, "a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." However, the release of Missouri v. Seibert, 542 U.S. 600 (2004), nearly twenty years later has generated confusion and conflict over the continued viability of Elstad as federal and state courts have struggled to apply the fractured Seibert decision to cases, such as the one below, where Miranda warnings are provided "midstream" during the course of a custodial interrogation. The resulting legal split among federal circuits and state courts of last resort provides an unsettled area of law which demands this Court's attention. Because the Florida Supreme Court below improperly commingled the relevant standards in an attempt to reconcile the

tension it identified as necessarily flowing from the case law, resulting in the suppression of a voluntary, post-warning confession, this case presents an appropriate vehicle to settle and resolve the proper analysis when these circumstances are presented.

The Conflict Among State and Federal Courts Interpreting Seibert

It is easy to identify the federal circuit split most commonly associated with Seibert's application, as the Florida Supreme Court acknowledged the line of debate in a footnote in its opinion rendered below. See Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37-A38):

> [FN9] While we focus on Justice Kennedy's concurrence in analyzing the holding of Seibert, there is a split in the federal circuits regarding whether the plurality rather than his concurrence operates as the controlling precedent. In fact, while the case cited by the dissent, United States v. Stewart, 388 F.3d 1079 (7th Cir. 2004), relies on Justice Kennedy's concurrence as to the holding of Seibert, more recent circuit cases have called into question the reliance on Justice Kennedy's concurrence rather than the plurality. See, e.g., United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) ("[W]e conclude that the Marks [v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)] rule

is not applicable to Seibert. Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."); United States v. Pacheco-Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008) (recognizing split in circuits as to whether Justice Kennedy's concurrence is controlling precedent); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) ("Determining the proper application of the Marks rule to Seibert is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court."). In Heron, 564 F.3d at 885, the Seventh Circuit recognized that it had not settled on a definitive approach to Seibert and held that its more recent decision in United States v. Peterson, 414 F.3d 825 (7th Cir. 2005), "may be in some tension with our decision in Stewart and Justice Kennedy's intent-based test."

A survey of relevant cases reveals that most federal circuits and several state courts of last resort have solidly adopted Justice Kennedy's concurring opinion as the holding in Seibert. See United States v. Carter, 489 F.3d 528, 536 (2d Cir. 2007), cert. denied, 128 S. Ct. 1066 (2008); United States v. Naranjo, 426 F.3d 221, 231-32 (3d Cir. 2005); United

States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005); United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006); United States v. Briones, 390 F.3d 610, 613 (8th Cir. 2004), cert. denied, 545 U.S. 1122 (2005); United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir. 2006); United States v. Street, 472 F.3d 1298, 1313 (11th Cir. 2006) (citing United States v. Gonzalez-Lauzan, 437 F.3d 1128, 1136, n.6 (11th Cir.), cert. denied, 549 U.S. 861 (2006)), cert. denied, 551 U.S. 1138 (2007); Ford v. United States, 931 A.2d 1045, 1052 (D.C. Cir. 2007), cert. denied, 533 U.S. 1026 (2008); State v. Hickman, ___ P.3d ___, 2010 WL 3555802, at *4 (Wash. 2010); Carter v. State, 309 S.W.3d 31, 38 (Tex.Crim.App. 2010); State v. Gaw, 285 S.W.3d 318 (Mo. 2009), cert. denied, 130 S. Ct. 1082 (2010); People v. Rios, 101 Cal.Rptr.3d 713, 723 (Cal. 2009); People v. Lopez, 892 N.E.2d 1047, 1069 (Ill. 2008), cert. denied, 129 S. Ct. 998 (2009); State v. Fleurie, 968 A.2d 326 (Vt. 2008). These cases typically describe Seibert as carving out an exception to Elstad's application. The Sixth and Tenth Circuits have expressly questioned the proper scope of Seibert, suggesting that it strictly limited Elstad to its facts and created a new analysis to apply in all cases where Miranda warnings are administered midstream to assess the effectiveness of the warnings as provided. United States v. Pacheco-Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir.), cert. denied, 549 U.S. 1065 (2006). The First Circuit has declined to resolve the question, finding the result would be the same under either the plurality or Justice Kennedy's tests in those cases which have presented the issue. United States v.

Verdugo, ___ F.3d ___, 2010 WL 3260805 (1st Cir. Aug. 19, 2010); United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010), pet. for cert. filed Sept. 2010. Most troubling are those jurisdictions, such as the Seventh Circuit, which are inconsistent about which analysis to undertake when reviewing the admissibility of statements made following Miranda warnings given in the middle of an interrogation. See United States v. Stewart, 388 F.3d 1079 (7th Cir. 2004) (applying Justice Kennedy's concurring opinion) and United States v. Heron, 564 F.3d 879 (7th Cir. 2009) (concluding that Marks does not apply to Seibert, and deeming it unnecessary "to resolve once and for all what rule or rules governing two-step interrogations can be distilled from Seibert"); see also Davis v. State, 990 So. 2d 459, 465-66 (Fla. 2008) (applying Justice Kennedy's concurring opinion) and Ross, 35 Fla. L. Weekly at 301-302 (A42-A43) (applying new totality-of-the-circumstances test which commingles the approach of Elstad, the Seibert majority, and Justice Kennedy's Seibert concurrence). Moreover, even those jurisdictions which appeared to have solidly adopted Justice Kennedy's concurring opinion have engaged in additional, unnecessary analyses, suggesting a lack of confidence in the true holding to be applied. See, e.g., United States v. Fellers, 397 F.3d 1090 (8th Cir.), cert. denied, 546 U.S. 933 (2005); Gonzalez-Lauzan, 437 F.3d at 1139, n.8, Fleurie, 968 A.2d at 333-36.

Thus, the most fundamental debate concerns the question of whether application of Seibert is properly assessed under Marks and therefore

restricted to Justice Kennedy's requirement that there be a deliberate, two-step strategy employed to compel Seibert's additional protections to insure the effectiveness of the Miranda warnings when given. The extent to which Elstad survived Seibert is a question which is necessarily at the heart of the Florida court's analysis below. By melding the voluntariness analysis of Elstad and the effectiveness-of-warnings analysis of Seibert into a wholesale, totality of the circumstances approach, the Florida court has returned litigation of this issue to the days before Miranda. Instead of assessing the voluntariness of particular statements on a case-by-case, totality of the circumstances approach, courts are now assessing the effectiveness of the Miranda waiver on a case-by-case, totality of the circumstances approach. Miranda itself attempted to resolve the difficult issue of the admissibility of incriminating statements made to law enforcement officers by providing an understandable method to insure that only those statements given after clear warning of the consequences could be produced for trial. In the absence of any evidence indicating either police misconduct (such as the use of coercion or Seibert's deliberate two-step strategy) or the suspect's inability to voluntarily waive his rights, the giving of full and accurate Miranda warnings, accompanied by a written acknowledgement and waiver of rights as in this case, should be sufficient to permit admission of the contested statements. However, in this case, the Florida Supreme Court ruled that it was not.

While the central issue in this case is whether a Seibert analysis into the effectiveness of midstream Miranda warnings is appropriate in the absence of evidence of an intentional tactic to delay Miranda until a confession has been obtained, other ancillary issues are also presented, such as the correct allocation of the burdens of proof and appropriate standards of review, which have also led to uncertainty and conflict. See United States v. Stewart, 536 F.3d 714, 719 (7th Cir.), cert. denied, 129 S. Ct. 741 (2008); United States v. Ollie, 442 F.3d 1135, 1142 (8th Cir. 2006); Williams, 435 F.3d at 1158, n.11; Carter, 309 S.W.3d at 38-39; Daniel S. Nooter, Note, Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda, 42 Am.Crim. L.Rev. 1093, 1113 (2005). These questions are of particular concern since "the trial judge's assessment of the interrogating officer's subjective intent is especially important under Justice Kennedy's approach in Seibert." Carter, 309 S.W.3d at 39. In its decision below, the Florida Supreme Court acknowledged that the trial court found "no evidence was submitted to show that the detectives deliberately withheld Miranda warnings until Ross confessed" but the appellate court did not feel bound by this finding, noting that "although deference is to be accorded to credibility findings, the issue of the admissibility of the postwarning statements is a mixed question of law and fact." Further, the court held "In this case, the trial court determined only that there was no evidence submitted to show that the detectives deliberately withheld Miranda until after Ross confessed, thus impermissibly shifting the burden of proof." This

holding conflicts with conclusions drawn in other cases with similar findings. Compare United States v. Crisp, 371 Fed. Appx. 925 (10th Cir. 2010) (unpublished) (statements admissible where "record does not reflect any indicia of deliberate action;" evidence insufficient to suggest deliberate delay); Stewart, 536 F.3d at 720-21 (finding of no deliberate delay is a factual finding entitled to deference); United States v. Naranjo, 223 Fed. Appx. 167, 169 (3d Cir.) (unpublished decision after remand) (statements properly admitted where officer testified he did not believe that he had to give warnings until the defendant was placed under arrest), cert. denied, 552 U.S. 1055 (2007); see also Carter, 309 S.W.3d at 41 (trial court's finding no improper intent reversed by intermediate appellate court finding a deliberate choice to undermine Miranda, which was reversed on discretionary review since the record supported the trial court's original finding); Ollie, 442 F.3d at 1143 (finding Justice Kennedy's test satisfied where there was no evidence presented on the issue of a deliberate delay). Therefore, there is conflict as to the proper application of Seibert above and beyond the basic question of whether Justice Kennedy's opinion controls.

Federal courts of appeal and state courts of last resort are divided on the proper application of Seibert. Consequently, this case satisfies Rule 10(b) of this Court's Rules relating to the propriety of certiorari review. There is clearly a need for a resolution from this Court to the existing division among courts across the country. Accordingly, the writ of certiorari should be granted.

The Florida Supreme Court's Opinion Below Conflicts With Elstad and Seibert

In addition to presenting an issue on which there is conflicting law among the federal circuits and state courts of last resort, this case also offers a state court of last resort decision on an important federal question which conflicts with this Court's precedents in Elstad and Seibert, warranting certiorari review under Rule 10(c) of this Court's Rules.

The Florida Supreme Court reversed Ross's convictions and resulting death sentences because the jury was allowed to consider the videotape of Ross's January 9, 2004 interview with Det. Waldron. In finding that Ross's confession should have been excluded, the Florida court commingled theories and standards from several different cases applying Miranda v. Arizona, 384 U.S. 436 (1966), including Oregon v. Elstad, 470 U.S. 298 (1985), and Missouri v. Seibert, 542 U.S. 600 (2004). Citing the overriding measure of finding a knowing and voluntary waiver from the totality of the circumstances, the court outlined the circumstances which allegedly compelled suppression: the fact that Miranda warnings were not provided at the point that the reviewing court concluded they should have been; the fact that the sheriff and his staff discussed the interview process before the interview started and monitored it as it progressed; and the fact that, when Miranda warnings were given, they were introduced as a

matter of "procedure," which the court held downplayed and diminished the importance of the warnings given so as to render them ineffective. As a result of its flawed legal analysis, the Florida court has reversed Ross's convictions for a new trial where the State may not offer evidence of Ross's voluntary, post-warning confession, despite the absence of any evidence of overreaching police misconduct or any evidence that Ross in fact failed to understand or appreciate the significance of the constitutional rights which he acknowledged and waived orally and in writing.

In discussing the governing case law, the Florida court "focused" on Justice Kennedy's concurrence when addressing Seibert. Ross, 35 Fla. L. Weekly at 301, n.9 [note at 309] (A37). However, rather than strictly applying Justice Kennedy's concurring opinion to restrict Seibert to its narrowest holding, the court's analysis demonstrates that it developed a new, "totality of the circumstances" standard to assess both the effectiveness of the Miranda warnings and the voluntariness of the Miranda waiver. See Ross, 35 Fla. L. Weekly at 301-305 (A42-A65). In doing so, the Florida court violated the "holding" of Seibert, which, pursuant to a straightforward application of Marks v. United States, 430 U.S. 188 (1977), must be construed as the narrowest ground on which the decision could be based.

It is readily apparent that this case does not involve the improper two-step strategy at issue in Seibert. It would be a stretch indeed to find that

Miranda warnings were withheld in this case until a confession had been obtained, since no confession was obtained prior to the administration of the warnings. Rather than restricting Seibert to cases presenting a method of securing a confession which would then be perfunctorily repeated following the warnings, the Florida Supreme Court changed the trigger by reviewing for any "improper and deliberate tactics in delaying the Miranda warnings." Ross, 35 Fla. L. Weekly at 301-303 (A42-A50).

As a result, the decision below is out of line with those cases holding that Justice Kennedy's opinion carved out a limited exception to Elstad, Seibert requires a court assessing the propriety of midstream Miranda warnings to first determine whether there was a deliberate strategy of delaying Miranda warnings until a confession had been obtained. According to Justice Kennedy, if this deliberate two-step strategy was not used, "[t]he admissibility of postwarning statements should continue to be governed by the principles of Elstad." Seibert, 542 U.S. at 622. Under Elstad, the first consideration is whether the initial, pre-warning statements were coerced or voluntarily produced. This is a necessary determination because there is a different analysis involved in assessing voluntariness of the waiver if there is a level of coercion which might carry over into the second interrogation.

In this case, the trial court determined that Ross's interviews, taken as a whole, "do not suggest that law enforcement engaged in coercion or intimidation." (A162). The dissenting opinion below,

which also expressly found Ross's initial, pre-warning statements to be "uncoerced," Ross, 35 Fla. L. Weekly at 307, n.33 [note at 310] (A76), recognized the majority's improper analysis and pointedly explained the error:

> [FN35] The majority cites the following language from Elstad as its support that Elstad requires an examination of the same factors as the plurality in Seibert would require: "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Majority op. at 31 (quoting Elstad, 470 U.S. at 310 (citing Westover v. United States, decided together with Miranda, 384 U.S. at 494)). However, this language does not apply every time there are two confessions with an intervening Miranda waiver. Rather, this language referencing Westover only applies after a determination that the pre-Miranda statements were coerced, which was not the case in Elstad. As the United States Supreme Court explained in Elstad,
>
> > [t]he failure of police to administer Miranda warnings does not mean that the statements received have actually

> been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See New York v. Quarles, 467 U.S., at 654, and n. 5; Miranda v. Arizona, supra, at 457. Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that Westover's requirement of a break in the stream of events is inapposite. In these circumstances, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will." Wong Sun v. United States, 371 U.S., at 486.

Elstad, 470 U.S. at 310-11 (footnote omitted). Indeed, in Elstad, the United States Supreme Court reversed the

> Oregon court's holding that, despite the fact that the pre-Miranda statements were uncoerced, "lapse of time, and change of place from the original surroundings are the most important considerations" in determining the admissibility of the post-Miranda statements. Id. at 303 (quoting State v. Elstad, 61 Or.App. 673, 658 P.2d 552, 554 (Or.App.1983), rev'd, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), which cited Westover v. United States, 384 U.S. 436, 496, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

Ross, 35 Fla. L. Weekly at 308, n.35 [note at 310] (A86-A87).

Thus, both Seibert and Elstad compel analyses which are necessarily sequential rather than cumulative. A court faced with a challenge to midstream Miranda warnings should first determine if there was a "two-step interrogation technique [ ] used in a calculated way to undermine the Miranda warning." Seibert, 542 U.S. at 622. If there was, the court must consider the Seibert factors to determine if the Miranda warnings lost their effectiveness due to the strategic delay. If there was no deliberate delay until a confession was obtained, Seibert does not apply and the post-warning statements must be assessed under Elstad. Applying Elstad, the court must first determine if the initial, pre-warning statements were coerced. If so, the factors noted in Elstad must be considered to assess whether the

coercion carried over into the post-warning questioning (the time elapsed between statements, whether the second phase of questioning involved a change in place or in the identity of the interrogators). If, however, the initial pre-warning statements were voluntary, "careful and thorough administration of Miranda warnings" overcomes the presumption of inadmissibility which applies to the pre-warning statements.

The court below departed from the sequential Seibert/Elstad analysis outlined above and substituted a new analysis involving "a multiplicity of factors" impacting the ultimate issue of admissibility. The Florida court outlined its approach as follows:

> The caselaw demonstrates that the analysis of the admissibility of statements made following a custodial interrogation and after the delayed administration of Miranda warnings is based on the totality of the circumstances, with the following being factors important in making this determination: (1) whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement; [FN11] (2) whether the police minimized and downplayed the significance of the Miranda rights once they were given; [FN12] and (3) the circumstances surrounding both the warned and unwarned statements including "the completeness and detail of the questions and

answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." [FN13] In addition, there are other circumstances to consider on a case-by-case basis, such as the suspect's age, experience, intelligence, and language proficiency. [FN14]

[FN11] See Elstad, 470 U.S. at 314 ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion [as to the later statement]." (emphasis supplied)).

[FN12] See Davis, 859 So.2d at 471 (noting that under Elstad, "a careful and thorough administration of Miranda warnings serves to cure the condition that made an unwarned statement inadmissible"); Ramirez, 739 So.2d at 574-75 (holding that postwarning statements had to be suppressed where officers employed a concerted effort to minimize and downplay the significance of the Miranda rights).

[FN13] Seibert, 542 U.S. at 615 (reviewing the following factors: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first"); see also Elstad, 470 U.S. at 310 ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.").

[FN14] See, e.g., Bevel v. State, 983 So.2d 505, 515-16 (Fla. 2008) (reviewing intelligence as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Chavez v. State, 832 So.2d 730, 750 (Fla. 2002) (reviewing defendant's understanding of the English language and noting that Miranda warnings were given in Spanish as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Ramirez, 739 So.2d

> at 576 (reviewing age and experience in criminal justice system as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights).

Ross, 35 Fla. L. Weekly at 301-302 [notes at 309] (A42-A43).

While the court identified the need to consider circumstances "such as the suspect's age, experience, intelligence, and language proficiency," the actual analysis conducted offered little concern for those traditional voluntariness factors. Conspicuously absent in the majority opinion below is any conclusion about the voluntariness of Ross's pre-warning custodial statements on January 9. The 64-page majority opinion devotes only a single sentence to these considerations, noting, "In addition, we also take into account that Ross was only twenty-one at the time with no indication of any prior experience with the criminal justice system." Ross, 35 Fla. L. Weekly at 304 (A64). This summary observation provides no support for any finding of coercion to defeat the trial court's finding that Ross entered a knowing, voluntary and intelligent waiver of his constitutional rights prior to confessing to having killed his parents.

Fundamentally, under Elstad, any analysis as to the voluntariness of statements produced after Miranda warnings are given midstream must begin with an analysis of the voluntariness of the initial,

pre-warning statements. As this Court has recognized, statements are not deemed to have been coerced simply because Miranda warnings were not given when required. "The Miranda exclusionary rule sweeps more broadly than the Fifth Amendment itself." Elstad, 470 U.S. at 306. In its opinion below, the Florida Supreme Court considered the initial statements to have been coerced just because they were unwarned. The court then analyzed whether this "coercion" carried over into the post-Miranda, warned statements. Finding that the warnings were "ineffective" because they were introduced as a matter of "procedure," the court then determined that the State failed to prove the voluntariness of the waiver, despite the absence of any actual coercion or confusion about the warnings as given. In doing so, the Florida court departed substantially from the proper analysis embodied in the holdings of Elstad and Seibert.

The Florida Supreme Court's decision in this case conflicts with this Court's precedents as to the proper assessment of the admissibility of voluntary statements following the administration of Miranda warnings during the course of a custodial interrogation. Consequently, certiorari review should be granted in this case.

CONCLUSION

Based on the foregoing arguments and authorities, Petitioner, the State of Florida respectfully requests that this Honorable Court GRANT this Petition for Writ of Certiorari.

Respectfully submitted,

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Case No. _____

IN THE UNITED STATES SUPREME COURT

STATE OF FLORIDA

Petitioner,

v.

BLAINE ROSS,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

OPINION OF THE FLORIDA SUPREME COURT A1-A90

TRIAL COURT ORDER ON MOTION TO SUPPRESS A91-A179

MIRANDA WAIVER FORM A180

Supreme Court of Florida

No. SC07-2368

BLAINE ROSS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[May 27, 2010]
REVISED OPINION

PER CURIAM.

Blaine Ross was convicted of the January 7, 2004, robbery and first-degree murders of his parents, Richard and Kathleen Ross. Ross, who was 21 at the time of the murders and living with his parents, appeals the judgments of conviction of robbery and first-degree murder and sentences of death. We have mandatory jurisdiction. See art. V, § 3(b)(1), Fla. Const.

After carefully reviewing the issues raised on appeal, we reverse the convictions and sentences of death because of the police conduct in interrogating Ross on January 9, 2004. Specifically, the police, over

a period of several hours of custodial interrogation, deliberately delayed administration of the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), obtained inculpatory admissions, and when the warnings were finally administered midstream, minimized and downplayed the significance of the warnings and continued the prior interrogation—all of which undermined the effectiveness of Miranda. In accordance with our precedent and the precedent of the United States Supreme Court, we conclude that under the totality of the circumstances, the waiver of the defendant's rights against self-incrimination was not voluntary, knowing, and intelligent, and the statements were not voluntarily given. Thus, for the reasons addressed below, we conclude that the police interrogation violated both Miranda and the defendant's constitutional rights under the Fifth Amendment to the United States Constitution and article I, section 9, of the Florida Constitution. Because the admission of the multiple inculpatory statements cannot be considered harmless beyond a reasonable doubt, we are compelled to reverse for a new trial.

FACTS

In reviewing the facts of this case, we focus on both the circumstances surrounding the murder and the police interrogation that produced the inculpatory statements. Richard and Kathleen Ross were murdered on January 7, 2004, in their home in Bradenton, Florida. Their son, Blaine Ross, called

911 after discovering them in their bed covered in blood.

At the time of their deaths, Kathleen Ross was in the process of obtaining a divorce from her husband, Richard, after she discovered that he was having an affair. Although Richard had not vacated the premises, he was spending considerable time away from the house.

Ross was living at his parents' house, but spent substantial time with his sixteen-year-old girlfriend, Erin. On January 7, 2004, the day of the murder, Ross and his girlfriend, Erin, planned to drive to Cape Coral in order to buy drugs. According to Erin, Ross was not at her house when she went to sleep around 10:30 or 11:00 at night on January 6, but he was there when she woke up the next morning.

The morning of January 7, before leaving for Cape Coral, Ross and Erin first went to the GTE Federal Credit Union where Ross attempted to withdraw money. When his attempt was unsuccessful, he went inside and spoke to an employee, Barbara Curtis. Ross gave Curtis an ATM card, claiming that the account was his and that his mother changed the personal identification number (PIN). When Curtis looked up the account information, however, Kathleen Ross was the only person listed as having access to the account. Ross told her that his mother was out of town, but he could not provide any number for her. Ross continued to ask Curtis to change the PIN, but she refused.

After Ross was unable to obtain any money at the bank, he stopped by Checkers, went by Sam's Club and filled his car with gas, and stopped at a Circle K where Ross tried again, unsuccessfully, to use the ATM card. Ross returned to his house with Erin and asked her to wait in his room while he talked with his parents. He proceeded to his parents' bedroom, where the murders had occurred.

After he discovered his parents' bodies, Ross and Erin went outside while Ross called 911. When the police arrived, Ross was in his front yard with Erin, who was visibly upset. The police found the exterior lights on, and all of the blinds within the house were closed. Ross's parents appeared to have died while sleeping, with significant injuries to their heads. Blood was splattered across the bedroom, all over the walls, and up to the ceiling. The victims also had ropes around their necks.[1] Although clothing was scattered around the room, it was still folded and partially stacked, which was inconsistent with a typical burglary. After the bodies were moved, police found keys, a checkbook, and a wallet in the pillowcase on which Richard Ross was lying.

Police found no signs of forced entry, but the kitchen sliding glass door was partially open. Ross's fingerprints were found on the inside sliding glass door. In the garage, police found a bag containing

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[1] The medical examiner found no injuries on Richard Ross from the ropes and opined that the ropes did not play a part in Richard Ross's death. He was unable to make the same determination as to Kathleen Ross because she had a significant blunt impact injury to that same area.

baseball equipment; however, the compartment that would normally hold bats was unzipped and empty. Ross's fingerprints were found on a cigarette lighter, which was on top of the partially empty baseball bag.

The State also presented evidence that Ross's black pants had spots of blood on them that was consistent with the blood of Kathleen and Richard Ross. Law enforcement officers found his pants in Erin's bedroom after Erin's mother gave the officers permission to search the residence. The pants were not the ones Ross was wearing at the time he discovered his parents' bodies and called 911.

Dr. Vega, the medical examiner, performed an autopsy and determined that the cause of death for both victims was blunt impact head injuries. He estimated that the time of death was between 3 a.m. and 5 a.m. on January 7. Dr. Vega opined that neither victim moved after the initial injury because there was no blood staining beyond the area already uncovered. He found no defensive injuries and opined that the victims were asleep when initially struck. The injuries were consistent with being struck by a bat. Richard Ross was hit at least twice, but possibly more. Kathleen Ross was struck at least four times, but likely more than four.

The State presented evidence that Ross had a financial motive for the crime. Specifically, shortly before his parents were killed, Ross made several withdrawals from his mother's account, totaling $1,401.50. On January 6, 2004, Ross and his mother signed a contract which stated, "I, Kathleen Ross,

has [sic] loaned Blaine Ross $1400 that will be paid back in full as soon as possible. Blaine will never ask for Sam's Club card or any other money."

On January 7, after the police responded to Ross's 911 call, Detective William J. Waldron talked to Ross at the scene and described Ross as very quiet, calm, and withdrawn. After Detective Waldron interviewed some neighbors, he returned to Ross and found him crouched down near a vehicle to avoid the media. Ross appeared particularly stressed based on the media's arrival. Ross asked Detective Waldron if they could go somewhere to talk, and Detective Waldron suggested the sheriff's office, to which Ross agreed. Ross and Erin were then taken to the Criminal Investigation Division (CID) of the Manatee County Sheriff's Office.

Law enforcement officers interrogated Ross multiple times.[2] On January 7, after arriving at CID, Detective Waldron interviewed Ross four times throughout the day and into the early morning hours of January 8. Although Ross was at the police station for about twelve hours, the total time that he was interviewed on January 7 and 8 was a little less than four hours. In between the interviews, Ross was given breaks whenever he asked, was permitted to be alone in a common area near the elevator, was not restrained in any manner, and was not supervised.

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[2] Ross was also interrogated by police on January 9, when he gave increasingly inculpatory statements. On January 12, he was interviewed while he was in jail. All of the interviews were audio recorded, and the interrogation on January 9 was also video recorded.

Detective Waldron conducted these interviews at a conference table in a large room.

The interviews were very conversational, but on occasion, the detective confronted Ross with discrepancies between his statement and statements from other witnesses. In the third and fourth interviews, another detective was also present, and the detectives became more direct with portions of Ross's story that were inconsistent. During the same day, the police also took statements from Erin and her mother, as well as other potential witnesses.

During the interviews on January 7 and 8, Ross was repeatedly assured he was not being arrested. After Ross finished providing the statements, a detective took Ross to Erin's house. After Ross was interviewed on January 7 and 8, he called Detective Waldron four times and left messages. In the last message, he stated:

> Hello Detective Waldron, this is Blaine Ross. I'm calling in regards to what's going on. I have some questions, um, regarding the case and then some things that have been brought up to me in the recent time. Please give me a call back....

On January 9, Ross and his sister arrived at the sheriff's office, where the victim advocate's office was located. Ross came to see the victim advocate so he could buy shoes. At the time of the visit, he was still barefoot because the police had taken his shoes when he was first questioned, and he was not

permitted to obtain any of his other shoes from his house as it was considered a crime scene.

When Ross arrived, Detective Waldron asked Ross to come see him when he finished with his meeting because he had received Ross's messages and had some more questions. Ross met with Detective Waldron as requested.

Detective Waldron believed that the January 9 interrogation was his last chance to talk to Ross without an attorney present, so he decided to change the location to a room where the interrogation could be videotaped. The room was much smaller than the room where Ross was initially interviewed. Inside the room, there was a small desk and three chairs. Detective Waldron sat relatively close to Ross. Ross's chair was in the corner of the room and he was, in essence, blocked in with a desk at one side and Detective Waldron in front of him. Ross was still barefoot. At least one other law enforcement officer was in the room, and at various times throughout the interview, other officers entered and exited the room, passing notes to Detective Waldron.

Detective Waldron was the primary interrogator throughout the questioning. Initially, he answered many of Ross's questions concerning the process of an investigation. After they talked about Ross's concerns, Detective Waldron questioned Ross about his prior statements given on January 7 and 8. The questioning became more accusatory, and at times, Detective Waldron raised his voice. Detective Waldron confronted Ross with evidence that Ross

had lied regarding significant aspects of Ross's prior statements. He then informed Ross that police had found the pants that Ross wore on the night his parents were killed and the pants had blood on them that matched the crime scene. The interrogation continued for about four hours in the same small room with Detective Waldron and other officers before Miranda warnings were finally administered. During the unwarned portion of the interrogation, Detective Waldron constantly referred to the bloody pants and emphasized that this evidence could not be disputed. Ross finally acknowledged that this evidence "[p]uts me at the crime scene." Shortly after that, Ross admitted that it was a possibility that he killed his parents:

> You made me dig inside and think about it, and you've also given me hard evidence that puts me at the crime. And I can't-I can't-I can't-I can't remember if I did this or not. I don't know. I mean, you-you have solid evidence, blood on my pants and everything, but I don't remember doing this, if I did it.

From this point on, Ross repeatedly asserted that he may have committed the crime but "blacked out" and had no memory of it. He further provided additional statements that implied he had reason to commit the murders:

> I can tell you that I didn't plan to kill my parents. I can tell you that I do bottle things up, and things that you've said does [sic] make sense. They do make sense to me, that I can

> [sic] have done this. I could have been so angry, done this. But I don't-I can't put myself there. I don't remember if I was there, so I can't tell you if I did it or not.

At approximately 7 p.m., Detective Waldron left the interrogation room. About fifteen minutes later, he returned and Ross asked, as he had done previously, if he could see his sister "one more time." Detective Waldron left the room again and returned shortly telling Ross, "I can't find her." Although Detective Waldron left the room for the ostensible purpose of checking if Ross's sister was still in the building, at trial he testified that he did not believe that she was in the building and he personally was not making any efforts to find her. When Detective Waldron returned, he eventually administered Miranda warnings and, under circumstances more fully explained in our analysis, Ross signed a written waiver. After more questioning by Detective Waldron based on the prior interrogation and further equivocation by Ross, Ross finally confessed that he killed his parents but did not remember committing the act.

> Ross: You were right about a couple of things. I was angry at my dad. I wasn't angry with my mom, she was trying to help me, she was giving me money. But when-you were right that I didn't do this on purpose. I remember dropping Mikey off-[unintelligible]-his neighborhood, I remember being in my house. I didn't do this on purpose.

Waldron: I know you didn't.

Ross: It was like I had just woken up, and I was standing there, not next-not next to my parents, but in front of their bed. I had a [unintelligible]-I don't know why, I don't know what triggered me to do it. I know I was angry at my dad,[3] but I don't know why I did this....

He stated that he "woke up" after the murders, realized what he had done, and tried to make it look like a robbery. When he discussed what happened after the murders, he also confessed to certain actions that later evidence showed that he did not do. Specifically, when Detective Waldron asked about Kathleen Ross's missing jewelry, Ross stated that he "[j]ust grabbed it" in order to "cover [his] tracks." In fact, Ross did not take the jewelry.[4]

Ross was subsequently arrested for the murder of his parents. On January 12, Detective Waldron arrived at the jail to talk to Ross based on a request made by Ross. After an initial discussion, the detective provided new Miranda warnings to Ross. During their discussion, Ross further answered additional questions as to where he disposed of the

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[3] Ross asserted that he was angry at his father because of the affair.

[4] Kathleen Ross's jewelry was missing from her house. Evidence presented at trial revealed that a few days before the murder, Kathleen Ross stopped by her mother's house with a paper bag, which she hid in the crawlspace of her mother's attic. After the murder, Ross's sister, Kimberly, found the paper bag with Kathleen Ross's jewelry box and jewelry inside.

evidence. However, none of this evidence was ever discovered.

At trial, Ross presented a defense, including the testimony of several neighbors who reported that, a few days before the murders, somebody had jiggled their doors or made noises outside their windows. Ross also presented an expert in false confessions, Dr. Gregory DeClue, to support the theory that the confession he made was coerced and unreliable.[5] He testified that there are factors that increase the likelihood of false confessions, many of which were present in this case. These factors include youth, immaturity, inexperience, low intelligence, mental illness, intoxication, and withdrawal from drugs. Police also use isolation to increase anxiety. Further, the police use certain techniques that increase the risk of a false confession, including escalating the pressure exerted on a suspect and the suspect's anxiety, exaggerating the evidence, providing information about the crime scene, and giving justifications why a person should confess, such as closure. After hearing all the evidence, the jury convicted Ross of two counts of first-degree murder and one count of robbery.

Following a penalty phase in which Ross put on mental mitigation from two experts as to his substantially impaired mental state at the time of the crime, the jury recommended a sentence of death by a vote of eight to four for each murder. The trial court imposed sentences of death after finding two

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[5] Dr. DeClue also testified at the hearing on the motion to suppress.

aggravators: a prior violent felony conviction (based on the contemporary murder convictions) and that the murders were committed during the course of a robbery (merged with pecuniary gain). The court found three statutory mitigating factors: Ross had no significant criminal history (given little weight); he acted under the influence of extreme mental or emotional disturbance (proven only as to drug use and given moderate weight); and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (proven only as to drug use and given moderate weight). The trial court rejected age as a statutory mitigator and found and weighed nonstatutory mitigation, including giving moderate weight to his history of substance abuse.

ANALYSIS

On appeal, Ross raises five issues: (1) whether the trial court erred in denying the motion to suppress Ross's statements on January 8 and January 9; (2) whether the trial court erred in allowing the State to introduce Ross's January 12 statement; (3) whether the State failed to demonstrate that the FDLE serologist was qualified to testify to the statistical significance of the DNA evidence; (4) whether the circumstantial evidence is insufficient to prove robbery and premeditation; and (5) whether the death penalty is disproportionate. In connection with the proportionality argument, Ross claims that he has a severe mental illness and that the trial court ignored "uncontroverted evidence" regarding his mental state. Because we conclude that

multiple statements made by Ross during the January 9 interrogation should have been suppressed and that the admission of those statements was not harmless beyond a reasonable doubt, we address only that issue in depth.[6]

Prior to trial, Ross filed a motion to suppress.[7] Following an evidentiary hearing, which included the admission of the recorded interrogation of Ross by the police, the trial court denied the motion to suppress. The trial court's findings included the following: (1) Ross was not in custody prior to the reading of the Miranda warnings on January 9; (2) Ross voluntarily waived his Miranda rights; and (3) Ross's statements were made voluntarily. The trial court further found that (1) Ross did not confess

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[6] We conclude that no extensive discussion is necessary as to the January 12 statements, because on that date the Miranda warnings were given once interrogation began and the court admitted only statements that were made after the Miranda warnings were administered.

[7] In the motion to suppress, Ross challenged both the statements made on January 7-8 and on January 9. On appeal, Ross focuses mostly on the January 9 statements. As to the January 7 and 8 interviews, we conclude that the trial court did not err in finding that Ross was not in custody at that time for the following reasons: Ross voluntarily went to the sheriff's office; the detective was merely obtaining Ross's statement as to the events surrounding his parents' deaths; although the detective did question Ross about conflicting statements, Ross was not confronted with the same type of incriminating evidence of his guilt; and Ross was often left by himself at the sheriff's office when he was not being interviewed, thus implying that he was free to leave. Because this was not an in-custody interrogation, the court did not err in admitting these statements.

before being read his Miranda rights; and (2) no evidence was submitted to show that the detectives deliberately withheld Miranda warnings until Ross confessed.

On appeal, Ross claims that the "trial court erred in allowing the state to introduce the videotaped in-custody confession obtained by Detective Waldron by means of multiple violations of appellant's rights protected by the United States and Florida Constitution." Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. U.S. Const. amend. V; art. I, § 9, Fla. Const; see also Traylor v. State, 596 So.2d 957, 964 (Fla. 1992) (stressing that under the basic contours of Florida's constitutional privilege against self-incrimination, "a main focus of Florida confession law has always been on guarding against one thing-coercion"). Based on these federal and state constitutional guarantees, if a defendant confesses during a custodial interrogation, in order for the confession "to be admissible in a criminal trial, the State must prove that the confession was not compelled, but was voluntarily made." Ramirez v. State, 739 So.2d 568, 573 (Fla. 1999).

Prior to Miranda, "the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause." Oregon v. Elstad, 470 U.S. 298, 304, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). In Miranda, "the United States Supreme Court enunciated a bright-line rule to guard against

compulsion and the coercive nature and atmosphere of custodial interrogation and 'assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.' " Ramirez, 739 So.2d at 573 (quoting Miranda, 384 U.S. at 469, 86 S.Ct. 1602). To protect the right against self-incrimination, the Supreme Court required that any individual held for interrogation must be clearly informed as to his or her rights, including the "right to remain silent, that any statement he does make may be used as evidence against him, and ... [the] right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444, 86 S.Ct. 1602. "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." Id.

The Supreme Court in Miranda concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely ." Id. at 467. Therefore, "unless and until [the Miranda] warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." Id. at 479.

"The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Id. at 476. The Supreme Court has also recognized that the

prophylactic Miranda warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." Elstad, 470 U.S. at 305, 105 S.Ct. 1285 (quoting New York v. Quarles, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)). As recognized in Elstad, the Miranda exclusionary rule sweeps more broadly than the Fifth Amendment itself: "A Miranda violation does not constitute coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements." Id. at 307 n. 1 (emphasis omitted). This presumption is irrebuttable for the purposes of the State's case in chief. Id. at 307. [8]

These protections are equally applicable under the Florida Constitution. As this Court has recognized, "[t]he protections enunciated in Miranda have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution." Ramirez, 739 So.2d at 573; see also Traylor, 596 So.2d at 964-66. Traylor explains the contours of our state constitutional law:

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognized the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the

[8] Such statements, however, can be used as impeachment during cross-examination. Id.

> significant potential for compulsion-both psychological and physical-in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing-coercion.... The test thus is one of voluntariness, or free will, which is to be determined by an examination of the totality of the circumstances surrounding the confession. This determination is to be made by the judge, in the absence of the jury, based on a multiplicity of factors, including the nature of the questioning itself.

Id. at 964 (footnote omitted).

In this case, the trial court concluded that Ross was not in custody on January 9 prior to the reading of the Miranda warnings, that Ross voluntarily waived his rights, and that the statements were made voluntarily. As we explained in Connor v. State, 803 So.2d 598, 605 (Fla. 2001), when reviewing a trial court's ruling on a motion to suppress, "mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach." We defer to a trial court's findings of fact as long as they are supported by competent, substantial evidence, but we review de novo a trial court's application of the law to the historical facts. See Cuervo v. State, 967 So.2d 155, 160 (Fla. 2007).

The actual facts of the interrogation in this case are uncontroverted; only the application of the law to the facts is at issue. In reviewing the issues related to the January 9 interrogation and statements, we address: (a) whether and when the interrogation of Blaine Ross became custodial, necessitating the administration of Miranda warnings; (b) whether, under the totality of the circumstances, the waiver of the Miranda rights was voluntary, knowing, and intelligent and whether the statements made after the waiver were voluntary; and (c) whether the error in the admission of the statements was harmless error beyond a reasonable doubt.

A. Pre-Miranda Statements-Custodial Interrogation

The first issue centers on whether the interrogation became custodial on January 9 prior to the time the Miranda warnings were administered, particularly after the detective confronted Ross with evidence that the victims' blood was found on his pants. Determining whether the defendant was "in custody" so as to require the administration of Miranda warnings involves a mixed question of law and fact subject to independent review. Connor, 803 So.2d at 605-06. The United States Supreme Court explained why this determination should be subject to independent review:

> Classifying "in custody" as a determination qualifying for independent review should serve legitimate law enforcement interests as effectively as it serves to ensure protection of

> the right against self-incrimination. As our decisions bear out, the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.

Thompson v. Keohane, 516 U.S. 99, 115, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). If Ross was subjected to custodial interrogation, then he should have been administered Miranda warnings.

Police are not required to give Miranda warnings to every potential suspect. Miranda warnings apply only to in-custody interrogations. Hunter v. State, 8 So.3d 1052, 1063 (Fla. 2008), cert. denied, --- U.S. ----, 129 S.Ct. 2005, 173 L.Ed.2d 1101 (2009); see also Miranda, 384 U.S. at 441-42. The reason for requiring Miranda warnings at this stage is because "interrogation in certain custodial circumstances is inherently coercive and ... statements made under those circumstances are inadmissible unless the suspect is specifically warned of his Miranda rights and freely decides to forgo those rights." Duckworth v. Eagan, 492 U.S. 195, 202, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) (quoting Quarles, 467 U.S. at 654, 104 S.Ct. 2626).

For Miranda purposes, custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444, 86 S.Ct. 1602. The determination of whether a person was in custody for purposes of Miranda depends on "how a reasonable person in the suspect's situation would

perceive his circumstances." Yarborough v. Alvarado, 541 U.S. 652, 662, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The United States Supreme Court explained this analysis as follows:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 663 (quoting Thompson, 516 U.S. at 112, 116 S.Ct. 457).

This Court has adopted the same objective, reasonable-person framework in determining whether a suspect was in custody. See Connor, 803 So.2d at 605. "[I]t must be evident that, under the totality of the circumstances, a reasonable person in the suspect's position would feel a restraint of his or her freedom of movement, fairly characterized, so that the suspect would not feel free to leave or to terminate the encounter with police." Id. To analyze the case-specific facts that are relevant to determining this issue, the Court considers the following four factors:

> (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; [and] (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Ramirez, 739 So.2d at 574.

With this framework in mind, we now proceed to determine at what point in time Ross was in custody. Although the four factors provide the structure of our analysis, the ultimate inquiry is twofold: (1) the "circumstances surrounding the interrogation;" and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Yarborough, 541 U.S. at 663, 124 S.Ct. 2140.

The first of the four factors, the manner in which police summon the suspect for questioning, weighs in favor of the State. Ross voluntarily came to the sheriff's office for a meeting with a victim's advocate. While he was at the office, Detective Waldron requested that Ross see him before he left, and Ross agreed.

We next turn to the second factor-the purpose, place, and manner of questioning. Initially, Detective Waldron asked Ross to again provide a statement of Ross's activities regarding the last day he was with his mother and questioned him as to inconsistencies in his story. However, at the point when Detective

Waldron informed Ross about the bloody pants, the detective's focus shifted from merely questioning a witness to attempting to obtain a confession and pressuring Ross to admit his involvement in the crime. The detective repeatedly told Ross that he knew Ross committed the crime and the only question remaining was why. This type of questioning, which was highly confrontational and accusatorial, lasted for hours and took place in a very small room at the station with at least two officers in the room. Moreover, at this point, when Ross asked for a smoke break, the detective told him to smoke in the room, while the questioning continued. This factor clearly supports a conclusion that the defendant was in custody.

The third factor to consider is the extent to which Ross was confronted with evidence of his guilt. This factor also weighs in favor of a finding that Ross was in custody. Ross was confronted with very strong evidence of his guilt during the January 9 interview· most importantly, that pants Ross wore on the night in question had blood on them that matched the crime scene. Detective Waldron referred to the bloody pants throughout the interview and how this evidence could not be disputed. Ross finally acknowledged that this evidence "[p]uts me at the crime scene."

At various points after this time, when Ross denied having any involvement in his parents' murders, Detective Waldron stressed, "The evidence says you did." Detective Waldron constantly referred to the blood on the pants as proof that Ross was at

the crime scene that night and, throughout the interview, accused Ross of killing his parents. Questioning by Detective Waldron included:

> Waldron: I know how that blood got there, Blaine. When you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death ....
>
> Waldron: And then you put that rope that was in the garage and you put it around your mother's neck, and you put it around your father's neck, and you slowly methodically, cold-bloodedly pulled it tighter and tighter and tighter, Blaine. After smashing in their heads. That's how you got that blood on your pants, those black Dickies that you were wearing Tuesday....
>
> Waldron: You want to see Erin go to prison now? ... Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. And the evidence doesn't lie.

Detective Waldron repeated variations of this type of accusatorial questioning over a period of hours before the Miranda warnings were given and after Ross was confronted with the blood on his pants.

The fourth and final factor to consider is that Ross was never informed he was free to leave. At the point when Ross was informed that the police had evidence that blood on his pants matched the crime

scene, a reasonable person would not believe he or she was free to leave. Moreover, all of the circumstances after this point conveyed the clear impression that he was not free to leave. After the interview turned accusatory and Ross asked for a cigarette break, Detective Waldron told Ross that he could simply smoke in the room. Ross responded, "I was also going to say you could handcuff me or something to make sure I don't run." This situation stands in contrast to how Ross was handled in his prior interviews, where he was permitted to go outside, take a break from the interrogation, and smoke a cigarette.

Later during the January 9 interrogation, Ross asked to speak with his sister who had accompanied him to the station. He was not permitted to talk to her outside the interrogation room she was brought to Ross. He asked for her again, and he was left in the room while Detective Waldron said that he would try to find her. When Ross asked if he was being charged with the crime, Detective Waldron avoided a direct answer by asking Ross what he thought should happen. Only once did Detective Waldron assure Ross that he was not currently being arrested, but this was moments before Detective Waldron provided Ross with Miranda warnings and after Ross made the admissions that he could have killed his parents. Therefore, the final factor weighs in favor of concluding that the interrogation was custodial.

Ultimately, as we have stated, the factors enunciated provide the basis for the twofold inquiry: (1) the "circumstances surrounding the

interrogation"; and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Yarborough, 541 U.S. at 663, 124 S.Ct. 2140; see also Connor, 803 So.2d at 606. In considering these factors in conjunction with each other, we conclude that the January 9 interview became a custodial interrogation. Although Ross initially went to the sheriff's office voluntarily, this is the only factor that weighs in favor of finding that the January 9 questioning was not an in-custody interrogation. The January 9 interview was held in a small room with multiple officers, and Ross was placed in a corner with Detective Waldron sitting in front of him. The manner and purpose of the interview was not merely to interview a witness and obtain his story. Detective Waldron was attempting to obtain incriminating statements or a change in Ross's story by confronting him with significant evidence that allegedly placed him at the crime scene and insisting that the police already knew he committed the crime.

Once the police informed Ross that they had his bloody pants that matched the crime scene, a reasonable person would not have felt at liberty to terminate the interrogation and leave. At this point the officer should have advised Ross as to his Miranda rights.

Our holding here is consistent with our precedent regarding when a defendant is in custody. See Ramirez, 739 So.2d 568. In Ramirez, an officer transported the suspect, Ramirez, to the police

station, where Ramirez was questioned in a small interrogation room by two detectives. Id. at 572. Ramirez was never told that he was free to leave, and the officers clearly indicated that they considered him a suspect and knew he was involved in the crime. See id. at 574. After reviewing the four relevant factors, this Court concluded that Miranda warnings should have been given because any reasonable person in Ramirez's position would have believed that he was in custody at the time of the interrogation. Id. We observed that "[s]hort of being handcuffed and being told that he was under arrest, we cannot perceive of circumstances that would be more indicative of a custodial interrogation than the circumstances of the interrogation" in Ramirez. Id.

Likewise, in Mansfield v. State, 758 So.2d 636, 644 (Fla. 2000), we concluded that the defendant was in custody for purposes of Miranda where consideration of the Ramirez factors "inevitably" led to that conclusion:

> Mansfield was interrogated by three detectives at the police station, he was never told he was free to leave, he was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect.

See also Wolliston v. State, 961 So.2d 1141, 1142 (Fla. 4th DCA 2007) (holding that defendant was in custody, despite the fact that the interrogation occurred in his own home, because the defendant was

confronted with the presence of illegal drugs and was not informed that he was free to leave).

In accordance with the case law governing when Miranda warnings must be given, we conclude that the officers should have provided Miranda warnings during the January 9 interrogation before the interrogation turned accusatorial and the officers confronted Ross with the bloody pants. Accordingly, any pre-warning statements made by Ross after this point should have been suppressed.

B. Validity of Statements After Miranda Waiver

We next address the issue of whether, under the totality of the circumstances, the waiver of the Miranda rights was voluntary, knowing, and intelligent and whether the statements made after the waiver were voluntary. The dissent agrees with our determination that Ross was in custody at the time Ross was confronted with evidence of the bloody pants. The dissent objects to our analysis of the validity of the statements given after the Miranda warnings, asserting that this Court did not give proper deference to the trial court's finding of facts that the delay in administering the Miranda warnings was not deliberate. However, although deference is to be accorded to credibility findings, the issue of the admissibility of the postwarning statements is a mixed question of law and fact. See Thomas v. State, 894 So.2d 126, 136 (Fla. 2004) (holding that regarding whether a waiver of Miranda rights is voluntary, knowing, and intelligent, "[a]ppellate courts should ... accord a presumption of

correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment[s]" (quoting Connor, 803 So.2d at 608)).

As this Court and the United States Supreme Court have made clear, "the ultimate issue of voluntariness is a legal rather than factual question." Ramirez, 739 So.2d at 575 (citing Miller v. Fenton, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). The State bears the burden of showing that "the confession was not compelled, but was voluntarily made." Id. at 573. Further, where a confession is obtained after the administration of Miranda warnings, "the State bears a 'heavy burden' to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel." Id. at 575 (citing Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); Fare v. Michael C., 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); Miranda, 384 U.S. at 475, 86 S.Ct. 1602; W.M. v. State, 585 So.2d 979, 981 (Fla. 4th DCA 1991)).

In the ordinary case, the teachings of Miranda dictate that the warnings will be administered once custodial interrogation begins and thus the prophylactic effect of Miranda will be served. This, however, is a case where the administration of the Miranda warnings was delayed for several hours into

the custodial interrogation. See Missouri v. Seibert, 542 U.S. 600, 609, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (plurality opinion) ("The technique of interrogating in successive, unwarned and warned phases raises a new challenge to Miranda.").

Miranda was intended to address and minimize the coercive effects of interrogation and guard against police techniques "likely ... to disable [an individual] from making a free and rational choice" about speaking. Miranda, 384 U.S. at 464-65. Whether a defendant validly waived his rights is a twofold inquiry:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Ramirez, 739 So.2d at 575 (quoting Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)) (internal quotation marks omitted).

In reviewing such challenges, courts must remain vigilant regarding whether a defendant was given an actual choice in order to guard against the potential danger of violating a defendant's constitutional right against self-incrimination. Ensuring that police do not use intimidation, coercion, or deception in obtaining a waiver also helps to protect the integrity of the truth-seeking process, including guarding against the danger of false confessions. We thus review the United States Supreme Court precedent and this Court's precedent as to whether the subsequent statements were admissible or should have been suppressed as being both a violation of the underlying principles of Miranda and a violation of Ross's constitutional rights under the United States and Florida Constitutions.

1. Relevant Case Law

In Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the United States Supreme Court held that the failure to administer the Miranda warnings before eliciting a confession does not necessarily render any subsequently warned statement inadmissible and that the admissibility of such statements must turn on whether the subsequent waiver is voluntarily, knowingly, and intelligently made. Id. at 310-11, 314-15. The eighteen-year-old defendant in Elstad first admitted guilt when he was questioned without Miranda warnings in the living room of his home while his mother was in the kitchen area, a few steps away. Id. at 315. After this initial confession, he was taken to

the sheriff's headquarters where, approximately one hour later and after a full warning and waiver of his Miranda rights, he gave a complete statement detailing his participation in the crime. Id. at 301, 314-15. The officers made no promises or threats during questioning at either the defendant's residence or the sheriff's headquarters. Id. at 301-02. In holding the second statement admissible, the United States Supreme Court stated:

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.... We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings.

Id. at 318 (emphasis supplied).

Elstad thus rejected a rigid rule that would render inadmissible a statement given after Miranda warnings were administered solely because Miranda warnings were not given earlier. However, Elstad also cautioned against a rigid rule that would simply allow the admission of all statements given after Miranda warnings. Rather, courts must examine "the surrounding circumstances and the entire course of police conduct." Id. "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Id. at 310. If a suspect made an unwarned but "clearly voluntary" earlier admission, a subsequent properly warned confession need not be suppressed, so long as the careful and thorough administration of the Miranda warning is given and the Miranda rights are waived. Id. at 310-11. Thus, the condition that rendered the initial "unwarned statement inadmissible" is "cure[d]" as to the subsequent statements after Miranda warnings are properly given. Id. at 311.

The Court in Elstad limited its holding to situations where police did not engage in "deliberately coercive or improper tactics" in obtaining the initial statements. Id. at 314. A situation in which the police did engage in improper tactics was addressed by this Court in Ramirez v. State, 739 So.2d 568 (Fla. 1999), where the police delayed providing a seventeen-year-old defendant with his Miranda warnings until after he made incriminating statements, and when those warnings

were finally provided, the officers undertook a "concerted effort to minimize and downplay the significance of the Miranda rights." Id. at 575. After examining Elstad, this Court held that determining whether a subsequent confession is voluntarily given requires an examination of the totality of the circumstances. Id.

This Court concluded that the circumstances surrounding the statements in Ramirez were distinguishable from Elstad. First, although the officers had probable cause to arrest Ramirez at the time of questioning, they delayed providing Miranda warnings until after he made incriminating statements. Then the police failed to provide him with a careful and thorough administration of Miranda warnings, instead minimizing the significance of the warnings. This Court found that the officers in that case instead employed a concerted effort to minimize and downplay the significance of the Miranda rights, thus exploiting the statements previously made to the officers so that Ramirez would not exercise his rights. Ramirez, 739 So.2d at 576. This Court noted that Ramirez had just turned seventeen years old and that the officers in that case lulled the young defendant into a false sense of security by telling the suspect that they were not arresting him and did not permit him to contact his parents before questioning. Id. at 574, 576-77. Finally, the officers administered the Miranda rights orally and did not secure a written waiver until after Ramirez had fully confessed to his involvement in the crime. Id. at 578. This Court therefore held that

Ramirez's confession should have been suppressed. Id.

In Davis v. State, 859 So.2d 465, 472 (Fla. 2003), the Court applied Elstad and distinguished Ramirez to conclude that the postwarning statements were admissible. The facts of Davis involve only brief initial questioning and no indication of a concerted effort to undermine the Miranda warnings. The officers informed Davis that they were there to discuss the disappearance of his girlfriend's mother, Ms. Robinson. Id. During the initial ten-minute discussion with the two officers, Davis admitted that he killed Ms. Robinson. Id. at 471. Upon hearing this admission, a detective immediately read Davis his Miranda warnings and obtained a signed written waiver. Id. Davis then proceeded to draw a map to the victim's body and gave a recorded confession. Id. We concluded that none of the circumstances that rendered Ramirez's warned confession inadmissible were present in Davis. Relying on Elstad, this Court held that the circumstances surrounding Davis's warned confession properly "cured" the condition that rendered the unwarned statement inadmissible. Id. at 472.

The circumstances of the police conduct in Elstad and Davis stand in stark contrast to the circumstances in Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004), which involves the intentionally delayed administration of Miranda warnings. In Seibert, the police in fact engaged in tactics of deliberately and intentionally withholding Miranda warnings. Specifically, the

officer who questioned the suspect admitted that he intentionally withheld Miranda warnings and relied on an interrogation technique he had been taught: "question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' " Id. at 606. In a plurality opinion, four justices agreed that Miranda was violated when the officer intentionally elicited an unwarned confession and then used that unwarned confession to elicit a second warned confession. The plurality discussed how such intentional techniques strike at the very heart of the purpose of Miranda warnings and increase the risk of inducing a coercive confession:

> Just as "no talismanic incantation [is] required to satisfy [Miranda's] strictures," it would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.' " The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires.

Id. at 611-12 (Souter, J., plurality opinion) (alterations in original) (citations omitted) (quoting California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981); Duckworth, 492 U.S. at 203, 109 S.Ct. 2875).

The plurality stated that the following facts were relevant to whether Miranda warnings delivered "mid-stream" could be effective in accomplishing their object: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." Id. at 615. The plurality explained that the circumstances of Seibert's interrogation "challeng[e] the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 617.

Because this was a plurality opinion, Justice Kennedy's opinion concurring in the judgment becomes a pivotal focus in determining the impact and ramifications of Seibert.[9] Justice Kennedy

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[9] While we focus on Justice Kennedy's concurrence in analyzing the holding of Seibert, there is a split in the federal circuits regarding whether the plurality rather than his concurrence operates as the controlling precedent. In fact, while the case cited by the dissent, United States v. Stewart, 388 F.3d 1079 (7th Cir. 2004), relies on Justice Kennedy's concurrence as to the holding of Seibert, more recent circuit cases have called into question the reliance on Justice Kennedy's concurrence rather than the plurality. See, e.g., United States v. Heron, 564 F.3d 879, 884 (7th Cir. 2009) ("[W]e conclude that the Marks [v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)] rule is not applicable to Seibert. Although Justice

stressed that he firmly believed in the correctness of the decision in Elstad because it "reflect[ed] a balanced and pragmatic approach to enforcement of the Miranda warning." Id. at 620 (Kennedy, J., concurring in the judgment). Specifically, he expressed concern with extending Miranda and did not believe that a subsequent voluntary statement made after Miranda warnings was tainted simply because a police officer made a good-faith mistake in determining exactly when Miranda warnings were required. However, like the plurality, he was equally concerned about the situation in Seibert where police used a two-step interrogation technique "designed to circumvent Miranda," id. at 618, because such a tactic "simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of 'knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " Id. at 621

Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree."); United States v. Pacheco-Lopez, 531 F.3d 420, 427 n. 11 (6th Cir. 2008) (recognizing split in circuits as to whether Justice Kennedy's concurrence is controlling precedent); United States v. Carrizales-Toledo, 454 F.3d 1142, 1151 (10th Cir. 2006) ("Determining the proper application of the Marks rule to Seibert is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court."). In Heron, 564 F.3d at 885, the Seventh Circuit recognized that it had not settled on a definitive approach to Seibert and held that its more recent decision in United States v. Peterson, 414 F.3d 825 (7th Cir. 2005), "may be in some tension with our decision in Stewart and Justice Kennedy's intent-based test."

(quoting Moran, 475 U.S. at 424, 106 S.Ct. 1135). He concluded:

> The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.

Id. at 622. These curative measures must "ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver." Id. Justice Kennedy posited that factors such as a "substantial break in time and circumstances between the pre-warning statement and the Miranda warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." Id. Alternatively, he posited that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." Id.

From a review of these cases, a tension emerges between two competing principles. On the one hand, suppression of a statement based on an innocent good-faith failure to immediately administer Miranda warnings when a defendant is in custody would neither serve the purposes of Miranda nor

vindicate Fifth Amendment rights. Suppressing truly voluntary and uncoerced statements would also not serve the interests of justice. On the other hand, allowing police to deliberately delay administering Miranda warnings with the hope that the defendant will confess or make inculpatory statements and then belatedly warn the defendant of the rights frustrates the prophylactic rule of Miranda. Police tactics that subject a defendant to repeated accusatorial custodial interrogation heighten the risk not only that the confession will be involuntary but also that it may in fact be unreliable.

Based on these principles and our review of the caselaw, we conclude that the issue before us is not only whether the police deliberately withheld the Miranda warnings in an impermissible "question first and warn later" technique under Seibert but whether under the totality of the circumstances the waiver was voluntary, knowing, and intelligent and whether the statements made after the waiver were voluntary under Elstad and our own precedent in Ramirez. The issue of involuntariness and coercion directly implicates the defendant's constitutional right against self-incrimination under both the Fifth Amendment and article I, section 9, of the Florida Constitution.

Focusing on whether the statements were voluntarily given is consistent with the holdings in both Elstad and Seibert. We agree with the dissent that Seibert applies once the determination is made that the police deliberately delayed administration of the Miranda warnings. However, the totality of the

circumstances analysis under Elstad also includes a multiplicity of factors that impacts the ultimate determination of voluntariness. We thus disagree with the dissent that administration of the Miranda warnings alone will suffice to render the statements admissible, absent a deliberate delay. The United States Supreme Court's opinion in Elstad and this Court's precedent in Ramirez support an application of a totality of the circumstances analysis when warnings are delivered midstream during an ongoing interrogation.[10]

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[10] The dissent asserts that Elstad and Seibert are different, coexisting standards. While it is true that a "deliberate two-step strategy" to circumvent Miranda is different from a good-faith mistake, the analysis of the factors to be considered overlap. Elstad itself rejected setting forth a rigid rule but rather directed courts to examine "the surrounding circumstances and the entire course of police conduct" in determining whether the second statement was voluntary. Elstad, 470 U.S. at 318, 105 S.Ct. 1285 (emphasis added). In its decision, the United States Supreme Court repeatedly emphasized that the relevant inquiry is whether the second statement was voluntarily made and provided examples of relevant circumstances that courts should consider when a prior statement was coerced, including "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators." Id. at 310. In Seibert, the plurality likewise stressed that courts must determine the voluntariness of the second statement and resolve whether Miranda warnings, given midstream, could effectively inform a defendant as to whether he had a real choice to not talk. Seibert, 542 U.S. at 612, 124 S.Ct. 2601. The plurality then set forth additional factors that were relevant to such an inquiry. Id. at 615. After doing so, the plurality reviewed Elstad and held that the factual differences in Elstad showed that questioning that occurred at the station house in that case was a "new and distinct experience" from the brief conversation that occurred at the defendant's house, and thus

The caselaw demonstrates that the analysis of the admissibility of statements made following a custodial interrogation and after the delayed administration of Miranda warnings is based on the totality of the circumstances, with the following being factors important in making this determination: (1) whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement; [11] (2) whether the police minimized and downplayed the significance of the Miranda rights once they were given; [12] and (3) the circumstances surrounding both the warned and unwarned statements including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as

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concluded that the Miranda warnings given in Elstad did present a genuine choice to the defendant. Id. at 615-16.

[11] See Elstad, 470 U.S. at 314, 105 S.Ct. 1285 ("We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion [as to the later statement]." (emphasis supplied)).

[12] See Davis, 859 So.2d at 471 (noting that under Elstad, "a careful and thorough administration of Miranda warnings serves to cure the condition that made an unwarned statement inadmissible"); Ramirez, 739 So.2d at 574-75 (holding that postwarning statements had to be suppressed where officers employed a concerted effort to minimize and downplay the significance of the Miranda rights).

continuous with the first." [13] In addition, there are other circumstances to consider on a case-by-case basis, such as the suspect's age, experience, intelligence, and language proficiency.[14]

2. Application of Law to Facts

a. Improper and Deliberate Tactics in Delaying the Miranda Warnings

First, we review whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to

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[13] Seibert, 542 U.S. at 615, 124 S.Ct. 2601 (reviewing the following factors: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first"); see also Elstad, 470 U.S. at 310, 105 S.Ct. 1285 ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession.").

[14] See, e.g., Bevel v. State, 983 So.2d 505, 515-16 (Fla. 2008) (reviewing intelligence as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Chavez v. State, 832 So.2d 730, 750 (Fla. 2002) (reviewing defendant's understanding of the English language and noting that Miranda warnings were given in Spanish as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights); Ramirez, 739 So.2d at 576 (reviewing age and experience in criminal justice system as one of the circumstances to be considered in determining whether a defendant knowingly and voluntarily waived his rights).

obtain the initial statement. This record in fact affirmatively establishes that, in marked contrast to both the United States Supreme Court opinion in Elstad and this Court's opinion in Davis, the police conducted the January 9 interrogation in a manner that arose from a deliberate decision among numerous officers, including the sheriff himself, to delay the administration of the Miranda warnings in order to attempt to elicit a confession. As mentioned above, Detective Waldron believed that this would be his last opportunity to question Ross before Ross obtained an attorney. Before the interview, the sheriff spoke to Detective Waldron, informing Detective Waldron that he was counting on him to "get closure on this." Detective Waldron and the sheriff discussed how the interview should be conducted, and the sheriff, along with numerous other officers, watched the entire proceeding from another room.

Further, Detective Waldron testified at trial that he knew his department's general orders required him to read Miranda rights to a suspect before the questioning turned to an accusatory stage. However, he deliberately chose not to follow this policy, asserting that it was merely a guideline.[15] In defending this decision, Detective Waldron asserted

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[15] We stress in this regard that the mere fact that Detective Waldron violated his department's procedures, which would have required the Miranda warnings sooner than the law may require, is not dispositive of our inquiry. Rather, we focus on whether the tactics used in the interrogation were a deliberate attempt to wear down Ross's resolve and produce a confession, as opposed to a good-faith mistake.

that while the sheriff did not explicitly tell him to violate the general policies, the sheriff gave him guidance on how this interview should proceed and since the sheriff was watching the entire interview, he would have stepped in if he disagreed with the detective's decisions.

Finally, the manner of questioning before Miranda rights were given and the length of time that the highly accusatorial questioning lasted demonstrate that this delay was deliberate. See Elstad, 470 U.S. at 300-01, 314 (holding that the postwarning statements were admissible where defendant confessed immediately after officer informed defendant why the police were questioning him); Davis, 859 So.2d at 471 (holding that the postwarning statements were admissible where the initial discussion was only ten minutes). Prior to the time when the Miranda warnings were administered, Detective Waldron constantly accused Ross of committing the crime based on blood found on Ross's pants. After hours of intense and highly accusatorial questioning, the police eventually wore down Ross's will until Ross responded to repeated questioning: "This is the scary part, now I think that I did do it." [16] The detective repeatedly attempted to elicit a full confession from Ross, telling him that confessing to a

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[16] For example, during this portion of the interrogation, Ross stated, "You made me dig inside and think about it, and you've also given me hard evidence that puts me at the crime, and I can't-I can't-I can't-I can't remember if I did this or not. I don't know. I mean, you-you have solid evidence, blood on my pants and everything, but I don't remember doing this, if I did it."

crime that happened in the heat of the moment was different from confessing to a premeditated murder.

The length of time this interrogation continued without Miranda warnings distinguishes this case from Elstad and from Davis. While the length of time is not determinative, it bears noting that cases in which no intentional conduct was found involved what appeared to be relatively brief initial interrogations and certainly nothing approximating the several hours of custodial interrogation without Miranda warnings involved in this case.

In arguing that the above conduct does not violate either Elstad or Seibert, the State relies on the fact that Ross had not made a full confession before Miranda warnings were given, asserting that if Detective Waldron was intentionally attempting to avoid Miranda, he would have waited until after Ross fully confessed.[17] We have already rejected this argument. See Ramirez, 739 So.2d at 572, 578 (finding that a midstream Miranda warning violated the defendant's constitutional rights even though the defendant had only confessed to breaking into the victim's house prior to the warnings and, subsequent to the warnings, confessed to being involved in the murder). While the detective certainly would have preferred to have obtained a complete confession before he administered the Miranda warning, he had

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[17] Under the State's theory, it could be argued that Ross never actually "confessed," since he always maintained that he had no memory of actually committing the murders. His ultimate confession addressed acts that happened only after his parents were murdered.

already obtained multiple damaging admissions over the many hours prior to the time the Miranda warnings were given.[18] He may have believed that Ross would not make any further inculpatory statements.

A violation of Elstad or Seibert depends not solely on whether a full confession was obtained before the warnings were given but also on whether the continuing custodial interrogation and delayed administration of Miranda was a deliberate attempt to elicit incriminating statements in a coercive manner, undermining the very purpose of Miranda. Miranda itself addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking and prohibited the State from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444, 464-65.

The State also asserts that Detective Waldron did not delay Miranda warnings, but merely waited until he received additional incriminating evidence:

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[18] Ross made numerous admissions during this time, each of which was followed by denials that he murdered his parents. For example, he stated, "I can tell you that I didn't plan to kill my parents. I can tell you that I do bottle things up, and things that you've said does [sic] make sense. They do make sense to me, that I can have done this. I could have been ... angry, done this. But I don't-I can't put myself there. I don't remember if I was there, so I can't tell you if I did it or not."

the discovery of a ski mask with blood on it. This claim of an innocent good-faith mistake on the part of Detective Waldron in delaying Miranda warnings until more incriminating evidence was received is inconsistent with the facts in the record. This case does not involve a situation where only one officer was involved and, contrary to the dissent's assertion, this determination is not a question solely of Detective Waldron's credibility but rather a totality of the circumstances inquiry. See United States v. Street, 472 F.3d 1298, 1314 (11th Cir. 2006).[19]

Further, even under the case law cited by the dissent, the government bears the burden of establishing that the delay in administering the Miranda warnings was not deliberate. See United States v. Stewart, 536 F.3d 714, 719 (7th Cir.), cert. denied, --- U.S. ----, 129 S.Ct. 741, 172 L.Ed.2d 729 (2008). In this case, the trial court determined only that there was no evidence submitted to show that the detectives deliberately withheld Miranda until after Ross confessed, thus impermissibly shifting the burden of proof. Further, the trial court did not determine the credibility of Detective Waldron's

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[19] The dissent relies on United States v. Stewart, 536 F.3d 714 (7th Cir. 2008), for its statement that the issue of whether the warnings were deliberately withheld is solely a question of credibility, which is a factual finding of the trial court entitled to deference. However, even Stewart acknowledges that there is "not yet a general consensus among the circuits about the standard of review that applies to Seibert-deliberateness determinations." Id. at 719.

explanation in light of the totality of the relevant circumstances surrounding the interrogation.[20]

Even if the trial court had assessed Detective Waldron's credibility, a finding which would be entitled to deference,[21] a determination of the deliberateness in delaying warnings does not turn solely on the reasons Detective Waldron gave for delaying the administration of the warnings. Detective Waldron was the only officer who testified as to why the law enforcement officers failed to give Miranda warnings. However, he was not the only officer involved in the decision as to when the Miranda warnings were to be administered. He consulted with his supervisors, was told how to proceed, and conducted the interview as requested. Although he knew his actions in delaying the Miranda warnings were contrary to his department's general orders, he did not believe that he violated the law because he knew the sheriff was watching the interview and relied on his belief that the sheriff

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[20] The majority of the trial court's order addresses the January 7 and January 8 interviews and whether Ross was in custody prior to being given his Miranda warnings. The trial court concluded that Ross was not in custody, a finding with which we disagree.

[21] Although the trial court issued an extensive order regarding the motion to suppress, the trial court's factual findings as to this issue are minimal. Specifically, the court stated, "There is no evidence that the detectives deliberately withheld Miranda until Defendant confessed." The court based this conclusion on two statements: (1) Waldron recognized that he was taught to provide Miranda warnings when a person is no longer free to leave; and (2) he read Ross his Miranda warnings after he learned of the ski mask.

would stop the interview if the detective's interrogation violated Ross's Miranda rights.

In addition, this improper questioning lasted for several hours after this point and continued in an extremely accusatorial manner where Ross was repeatedly told that his denials were not accepted. Other officers at times entered the room during the interrogation and also watched the interrogation from a separate video room. In addition, prior to receiving the ski mask, the police had the following incriminatory evidence: Ross's recent admissions that it was possible that he killed his parents, Ross's bloody pants, evidence that Ross was attempting to take his mother's money, and prior incriminating statements from Ross.

Based on the above analysis, we conclude that rather than merely making a good-faith mistake, the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement.[22]

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[22] Our conclusion is further supported by decisions of other courts that have been similarly troubled by clear custodial interrogations that occurred without providing Miranda warnings first and thus have concluded that police deliberately delayed providing Miranda warnings in order to obtain incriminating statements. See, e.g., United States v. Williams, 435 F.3d 1148, 1159 (9th Cir. 2006) (noting that after law enforcement detains a suspect and subjects him to interrogation, "there is rarely, if ever, a legitimate reason to delay giving a Miranda warning until after the suspect has confessed" unless the interrogator wants to weaken the warning's effectiveness); United States v. Ollie, 442 F.3d 1135, 1141 (8th Cir. 2006) (holding that the delay in not providing Miranda warnings was deliberate where police chief

b. Significance of Miranda Rights Minimized and Downplayed

We next review whether the police minimized and downplayed the significance of the Miranda rights once they were given. This factor is important to ensure that a suspect who is provided with a tardy administration of the Miranda warnings truly understands the importance and the effect of the Miranda warnings in light of the problems faced when warnings are delivered midstream. While a "careful and thorough administration of Miranda warnings serves to cure the condition that made an

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interrogated suspect until obtaining a confession and an agreement to provide a written confession and only then provided Miranda warnings); Edwards v. United States, 923 A.2d 840, 849 (D.C. 2007) (holding that the delay was deliberate where the detective acknowledged that suspect was in custody, asked questions he knew could lead to incriminating answers, and knew the suspect had not been given his Miranda warnings); People v. Lopez, 892 N.E.2d 1047, 1070-71 (Ill. 2008) (holding that although the detectives explicitly denied using the "question first, warn later" technique, they deliberately engaged in an improper two-step interrogation by questioning a suspect without providing Miranda warnings when they acknowledged that the suspect would not have been free to leave the police station if he had attempted to do so); State v. Dailey, 273 S.W.3d 94, 109-10 (Tenn. 2009) (holding that the delay was deliberate despite the fact that officers testified that they did not provide Miranda rights because they were not yet arresting the suspect based on the following factors: (1) police called the suspect to the police station under false pretenses; (2) although the officers asserted the suspect was not under arrest, they failed to advise the defendant that he was not under arrest and that he was free to leave at any time; and (3) after he confessed and was provided with Miranda rights, they failed to inform him that his initial statement was inadmissible against him).

unwarned statement inadmissible," Davis, 859 So.2d at 471, where police minimize and downplay the significance of the warnings, the very purpose of Miranda is undermined. See Ramirez, 739 So.2d at 576.

As Justice Kennedy explained in Seibert, if a deliberate two-step strategy is employed, then the postwarning statements must be excluded unless curative measures are taken that will "ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver." Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment) (emphasis supplied). As the Seibert plurality similarly stated, when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, "they are likely to mislead and 'deprive[] a [suspect] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " Id. at 613-14 (Souter, J., plurality opinion) (first alteration in original) (quoting Moran, 475 U.S. at 424, 106 S.Ct. 1135).

For the reasons addressed below, we conclude that the significance of the Miranda rights was minimized and downplayed based on the following facts: (1) prior to providing Ross with his Miranda rights, Detective Waldron minimized the significance of the rights by asserting they were only a matter of procedure; (2) prior to the warnings, the detective lulled Ross into a false sense of security by asserting that he was not arresting him at that time; (3) when

Ross indicated a hesitancy in talking, the detective did not stop the interrogation immediately; and (4) rather than informing Ross that his prior incriminating statements could not be used against him, Ross was reminded about his earlier admissions, implying that exercising the right to remain silent would be futile.

Immediately prior to providing Ross with his Miranda rights, Detective Waldron stated to Ross:

> Waldron: There's a couple of things that I need to go over with you real quick. There's a couple of things I discovered, and before we go any further I want to cover this with you, it's just a matter of procedure, um, based on everything we're talking about.
>
> Ross: So am I being arrested?
>
> Waldron: Nope. At this time you and I are talking, okay? And I would like to talk to you some more. But before I can do that I need to go over this. You're not in handcuffs or anything like that, okay?

This strategy, employed after the hours of unwarned interrogation, de-emphasized the significance of the Miranda warnings. By referring to it as a matter of procedure, the detective conveyed the clear impression that the warnings were merely a bureaucratic formality. After making the remarks to Ross, Detective Waldron then showed Ross a written

Miranda form and told Ross, "I got to read this to you, Blaine." The following colloquy ensued:

> Waldron: Having these rights in mind you wish to talk to us now?
>
> Ross: I don't-I can't tell you anything different.[23]
>
> Waldron: And that's up to you.
>
> Ross. So, I'm-
>
> Waldron: I can't make your decision for you.
>
> Ross: I want-I'd really like to talk to my sister, and since she's not here-
>
> Waldron: We tried to get in touch with her, get her back here.
>
> Ross: I don't know what I'm going to do. I don't know what's going to happen, and-
>
> Waldron: Well, I'm willing to talk to you if you want. We're trying to get in touch with your

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[23] Although Ross raised the claim that police failed to abide by his invocation of the right to remain silent, he did not raise this particular incident, but points to a later portion in the interrogation where he alleges that he invoked his right to remain silent. However, we consider how Detective Waldron responded to this statement as a part of our determination of whether Detective Waldron minimized or downplayed the significance of the Miranda rights, as addressed below.

sister now[24] so you're indicating that you do want to talk to me; correct?

Ross: Yes.

Waldron: Okay, if you would, please sign right there.

After having Ross sign the waiver of Miranda warnings, Detective Waldron then asked Ross about a ski mask that they found in his car with blood on it, and Ross provided an innocent explanation for the ski mask.[25] At that point, the interview turned back to their prior discussion. Detective Waldron reminded Ross of his prior statements as follows:

> Like I was saying before, earlier, there's a lot of things that happened today, and there's a lot of things that have come at you, and a lot of things that you've admitted to now, that you've kept bottled up inside before, hidden, that you're now having to deal with. I know this is very difficult. I do know that you loved your parents.

(Emphasis supplied.)

Detective Waldron continued his prior line of questioning that was established before the warnings without any break in the interrogation. He asked

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[24] In actuality, as Waldron testified at trial, he was not trying to get in touch with Ross's sister.

[25] The ski mask in fact was not related to the murder and was not used at trial.

many of the same or similar questions. He played on the same themes and employed many of the same techniques, such as stressing that he would not think less of Ross and that he had compassion and understanding because he knew people have tempers and can hurt those they love.[26]

Ross initially asserted that he did not believe that he committed the murders and asserted that he did not think he had anything else to say:

> Ross: Well, I told you-you-you're right, about a lot of things. I, I, I don't think I did this. I don't know-(unintelligible)
>
> Waldron: I know you say you don't think you did this, but there's the blood on your pants. This wasn't a burglary, somebody who broke into that house.
>
> Ross: I don't think I can help you anymore. I don't think I have anything else to say.[27]

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[26] For example, shortly after reminding Ross as to his prior admissions, he told Ross:

> And that's why I'm capable of having some understanding and feelings and compassion. And that's why I'm talking to you this way. Okay? You're a human being. As human beings we make mistakes. Unfortunately we hurt people, and we hurt people we don't mean to. We have tempers, we lose control, we do things that we later regret. And also being human, we're al-lowed to go forward from those mistakes.... And I know what it is to hurt, the same as you do.

[27] Ross asserts that this was an attempt to invoke his right to remain silent. This statement in isolation would be an equivocal

In response, Detective Waldron stressed that Ross had to make this "right," that the evidence already told a story as to what happened, and that Ross had to make it right by accepting responsibility for his actions. After he brought up the bloody pants again and discussed additional inferences that he could make based on the crime scene, Ross confessed that he killed his parents.

As the record establishes, Detective Waldron minimized the significance of the warning when it was given by telling Ross that reading the rights was "just a matter of procedure." Further, when Ross asked whether he was going to be arrested, Detective Waldron told him not at that time. However, based on statements made during the evidentiary hearing, Detective Waldron clearly knew he had probable cause to arrest Ross at that time and thus his statements to the contrary were an attempt to lull Ross into a false sense of security. Specifically, Detective Waldron stated that he did not provide Miranda warnings earlier because he did not believe that he had probable cause to arrest Ross, and that once he had probable cause it would have been

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invocation of his right to remain silent, which does not require the interrogation to stop. See, e.g., State v. Owen, 696 So.2d 715, 717 n. 4, 718 (Fla. 1997) (holding that the statements "I'd rather not talk about it" and "I don't want to talk about it" were equivocal and, thus, the police had no duty to clarify the suspect's intent and could proceed with the interrogation). However, we consider Ross's statements and Detective Waldron's responses as part of the totality of the circumstances as to whether Ross's waiver was voluntary, knowing, and intelligent.

necessary to administer the Miranda warnings.[28] According to Detective Waldron, it was the discovery of the ski mask that allegedly provided this probable cause and prompted Detective Waldron to advise Ross as to his rights. Yet at this very point during the interrogation, when Ross asked if he was being arrested, Detective Waldron explicitly denied it, telling Ross that he was not being arrested at that time but that they were merely "talking."

We have previously found troubling such attempts to lull a defendant into a false sense of security. See Ramirez, 739 So.2d at 576-77 (finding that the police had lulled a young defendant into a "false sense of security" which was "calculated to delude him as to his true position" when officers denied they were arresting the defendant at the time Miranda warnings were given, despite having "ample probable cause"). In addition, when Ross first hesitated about his desire to talk to the detective and said he did not wish to talk, Detective Waldron did not immediately stop the interrogation.[29] Instead, the detective continued in his request for Ross to talk with him, letting him know that he understood that the decision belonged to Ross, that he would not make Ross's decision for him, that he was attempting

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[28] Of course, administration of the Miranda warnings does not depend on whether there is probable cause to arrest the individual, but on whether the interrogation is custodial.

[29] As addressed above, after Detective Waldron finally provided Ross with his Miranda rights, he asked Ross whether Ross wished to talk to police, and Ross replied, "I don't-I can't tell you anything different."

to locate Ross's sister, and that he was still "willing" to talk to him.

Finally, prior to resuming the interrogation relating to the bloody pants, rather than informing Ross that his prior admissions could not be used against him, Detective Waldron did the opposite, reminding Ross about everything that happened that day and that there were "a lot of things that [Ross] admitted to now." Detective Waldron continued his prior questioning without any break from the prewarning interrogation, playing on the same themes and using the same tactics as earlier. Based on the tactics used and the fact that Detective Waldron reminded Ross about his admissions immediately after providing him with his Miranda warnings, Ross would likely have had the misimpression that his prior incriminating statements could be used against him. Such a tactic downplayed the significance of the Miranda warnings.

We conclude that in contrast to Davis and more similar to Ramirez, the police minimized and downplayed the significance of the Miranda rights once they were finally administered. In Seibert, the plurality stressed the danger of providing Miranda warnings in the middle of an interrogation, particularly after incriminating statements have already been made:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he

> had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.

Seibert, 542 U.S. at 613, 124 S.Ct. 2601 (footnote omitted).

Similarly in this case, when Ross was finally given his Miranda warnings, he was told, "Anything you say may be used against you in a court of law." Ross could have reasonably believed that all of his prior statements would be admissible regardless as to what he said in the future. Thus, providing Miranda warnings at this point to Ross could have misled Ross about the consequences of the decision to abandon his rights. If Ross believed that what he stated in the previous few hours could have been used against him, any attempt to invoke his "right" to remain silent would have been futile.

As we have made clear, any waiver must be "the product of free and deliberate choice rather than intimidation, coercion, or deception ... and must have

been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Ramirez, 739 So.2d at 575 (quoting Moran, 475 U.S. at 421, 106 S.Ct. 1135). Based on all of the circumstances regarding the delay in administering Miranda and the manner of administering Miranda, we conclude that the officers minimized and downplayed the significance of the warnings so as to undermine the effectiveness of Miranda.

c. Circumstances Surrounding Both the Warned and Unwarned Statements

Finally, as addressed in both Elstad and Seibert, courts review the circumstances surrounding both the warned and unwarned statements including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." Seibert, 542 U.S. at 615, 124 S.Ct. 2601; see also Elstad, 470 U.S. at 310, 105 S.Ct. 1285 (also directing that courts examine the surrounding circumstances when the initial statement is actually coerced, including "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators").

The circumstances surrounding the warned and unwarned circumstances in Elstad are different

from those in this case. In Elstad the defendant had first been questioned in the living room of his house with his mother close by. He was then taken to the sheriff's headquarters where full Miranda warnings were given and where no threats or promises were made.

In contrast to Elstad, in this case, the accusatory questioning on January 9 took place in the same small room where Ross had previously been for hours, during which he had already made incriminatory statements. He was questioned not only in the same place, but by the same law enforcement officer, and the substance of the questioning was the same. The questioning was nothing more than one continuous round of interrogation with no meaningful break. Moreover, as emphasized above, after providing Miranda warnings, Detective Waldron again reminded Ross of his prior admissions, which also shows that the second round of questioning was treated as continuous with the first round. Thus, the first and second interrogations (if they can be divided) were conducted in the same manner, in the same room, with the same officers, with only a very short break in between. This is the very problem noted by the Seibert plurality:

> Thus, when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning

> them." Moran v. Burbine, 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle.

Seibert, 542 U.S. at 613-14. This danger was present under the facts of this case, particularly in light of the fact that the interrogation consisted of "integrated and proximately conducted questioning" with no meaningful break and with constant reminders of the preceding multihour interrogation.

d. Conclusion as to Whether Confession Was Voluntary

While police eventually provided Ross with his complete Miranda warnings, the timing and circumstances of the warnings undermined the intent and effectiveness of Miranda, particularly in light of the following: (1) the initial Miranda warnings were deliberately delayed and no warnings were given until after Ross made incriminating statements; (2) police downplayed the significance of the Miranda rights and misled Ross by assuring him that he was not being arrested "at the time" despite the incriminating evidence and Ross's prior statements; (3) before continuing the postwarning interrogation, the police reminded Ross about his earlier admissions; (4) police did nothing to counter the

probable misimpression that Ross's prior incriminating statements could be used against him; and (5) police treated the pre- and postwarning interrogation as one continuing round of questioning with only a minimal break but no change in circumstances. In addition, we also take into account that Ross was only twenty-one at the time with no indication of any prior experience with the criminal justice system.

As we explained, the danger of police engaging in the type of tactics exhibited in this case is not only that the prophylactic purpose of Miranda is undermined but that the confession itself is unreliable. Dr. DeClue, Ross's false confession expert, explained the factors that increase likelihood of false confessions, many of which were present in Ross's case, such as increasing the pressure, exaggerating evidence, challenging a person's memory, continuing an interrogation for a lengthy amount of time, showing photographs of the crime scene, and using isolation. The very fact that Ross confessed that he might have taken his mother's jewelry when in fact the evidence reveals that Kathleen Ross herself had actually taken the jewelry from her house and placed it in her mother's house highlights this danger.

Miranda was designed to combat pressures in custodial interrogations and holds that "to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights." Miranda, 384 U.S. at 467, 86 S.Ct. 1602. The inquiry when Miranda warnings are delayed, after a lengthy custodial

interrogation, is whether the warnings functioned effectively to apprise the defendant that he or she has the "right to choose between silence and speech." Id. at 469. When the Miranda warnings are purposely delayed after hours of custodial interrogation, when Miranda warnings are given in such a way as to minimize and downplay their significance, and when the postwarning interrogation is treated as a continuation of the prewarning interrogation, the risk is that the suspect will not understand the rights and the consequences of waiving the rights. The risk is that the very purpose of Miranda is undermined and that the warnings will not function effectively as Miranda requires.

In conclusion, the State must prove that the defendant voluntarily, knowingly, and intelligently waived his Miranda rights and that the postwarning statements were voluntary. Here, the State did not meet that burden based on an analysis of the totality of the circumstances. We reach this conclusion both under an analysis of Elstad and Seibert and under our precedent in Ramirez. Thus, the statements provided after the Miranda warnings were likewise required to be suppressed.

C. Harmless Error Analysis

The conclusion that the multiple statements given by Ross on January 9 should have been suppressed does not end our inquiry. Our caselaw provides that "[t]he erroneous admission of statements obtained in violation of Miranda rights is subject to harmless error analysis." Mansfield v.

State, 758 So.2d 636, 644 (Fla. 2000) (quoting Caso v. State, 524 So.2d 422, 425 (Fla. 1988)).

In State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), this Court set forth the harmless error test, which

> places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135 (citation omitted). As DiGuilio emphasizes, "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence." Id. at 1136. In fact, DiGuilio emphasizes that constitutional errors such as comments on the right to remain silent are "high risk errors because there is a substantial likelihood that

meaningful comments will vitiate the right to a fair trial by influencing the jury verdict." Id.

Certainly, in this case, there was evidence of the defendant's guilt, including physical evidence. However, the statements that the defendant made on January 9 were relied on by the State to prove his guilt and repeatedly emphasized. The defendant, in his defense, attempted to show that the confession was a product of coercion by introducing the testimony of Dr. DeClue. In this case, we are unable to conclude beyond a reasonable doubt that there is no reasonable possibility that the substantial admissions heard by the jury did not contribute to the first-degree murder convictions. Compare Ramirez, 739 So.2d at 571-72, 577 (concluding that erroneous admission of confession could not be deemed harmless error despite strong evidence against Ramirez, including that the codefendant had confessed and identified defendant and the police recorded a call where the codefendant and Ramirez discussed the physical evidence and planned to destroy it), and Thompson v. State, 595 So.2d 16, 18 (Fla. 1992) (concluding that erroneous admission of confession could not be deemed harmless error because based on the evidence, the court could not state beyond a reasonable doubt that the impermissible admission of the confession did not affect the jury's verdict), with Alvord v. Dugger, 541 So.2d 598, 600-01 (Fla. 1989) (finding the erroneous admission of statements based on an improper Miranda warning was harmless because the statements were not the principal part of the State's case but were cumulative to significant evidence from

numerous witnesses, including "primary evidence" presented by the defendant's girlfriend, who testified that the defendant admitted that he killed all the victims and described the crime). Under the circumstances of this case, the State is unable to sustain its heavy burden. We thus find that the convictions for robbery and first-degree murder must be reversed.

CONCLUSION

Based upon the foregoing, we reverse Ross's convictions for robbery and first-degree murder and vacate his sentences of death. We remand this case to the trial court with directions that a new trial be conducted without introducing the portions of statements of January 9 after the officers confronted Ross with the bloody pants.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, and LABARGA, JJ., concur.

QUINCE, C.J., specially concurs with an opinion.

POLSTON J., dissents with an opinion, in which CANADY and PERRY, JJ., concur.

QUINCE, C.J., specially concurring.

I concur in the majority opinion because the police interrogation technique used in this case was a deliberate attempt to get an admission/confession

before the defendant exercised his rights. The Seibert-type technique used in this case is one that we have been seeing with more frequency. I believe it is a technique that may put in jeopardy prosecutions that might otherwise not be reversible on appeal. In Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (plurality opinion), the United States Supreme Court explained the significance of Miranda[30] warnings. The Court indicated that a tactic that is designed "to get a confession the suspect would not make if he understood his rights," Seibert, 542 U.S. at 613, 124 S.Ct. 2601, was unconstitutional because such tactics thwart the purpose for which Miranda was designed-to reduce the risk of coerced confessions. See id. at 611-12.

Recently, in McWatters v. State, 35 Fla. L. Weekly S169 (Fla. Mar. 18, 2010), we addressed another situation where the police used a similar albeit different kind of technique to attempt to undermine the effectiveness of the Miranda warnings. In McWatters, the police read the suspect his Miranda rights in conjunction with questioning for an offense unrelated to the murder and sexual battery case. McWatters was not questioned after the warnings were given but was instead taken to the police station and placed in a room which contained evidence relating to the murder case. He was later told that he had been taken to the wrong room; he was then paraded through the police station past witnesses related to the murder case. Although we found that the defendant knowingly waived his

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[30] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

rights, it was of concern that the police used this technique, especially given the fact that the officer admitted that the ruse was being used to keep McWatters from invoking his rights.

In this case, the officer likewise testified that he knew the interview on January 9 would be his last opportunity to get an uncounselled statement from the defendant. Therefore, the officer boxed the defendant into a small interrogation room with other officers coming in and out, he would not allow Ross to leave, and all the while the officer was telling Ross he was not under arrest. Yet at the same time the officer was continually confronting Ross with evidence against him. It is obvious that under the circumstances the defendant was NOT free to leave; thus Miranda warnings should have been given at that point. It was only after Ross made some incriminating statements that Miranda warnings were given. And even after the warnings were given, the officer downplayed their significance by making it seem as if the warnings were only a formality that the officer had to comply with.[31]

Seibert recognized that this type of "question-first" tactic is in direct conflict with the underlying purpose of the Miranda warnings. See Seibert, 542

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[31] Although the defendant does not challenge his statement based on the invocation of his rights, there is also some question here as to whether or not the defendant invoked his right to silence after the reading of the warnings. When asked if he wished to waive the rights and talk with the officer, the defendant said, "I don't-I can't tell you anything different." However, the officer continued to talk with Ross, and Ross thereafter gave other incriminating statements.

U.S. at 611, 124 S.Ct. 2601. It is worth noting that both the interrogation here and the interrogation in McWatters took place before the Supreme Court issued its opinion in Seibert. However, if police continue to use these types of techniques in circumstances where it is clear that the focus of any investigation has turned to the defendant and Miranda warnings should be given, I fear that we will have more cases that will be reversed on appeal.

POLSTON, J., dissenting.

After holding an evidentiary hearing that produced more than 1,000 pages of transcript, the trial court found that the police officers in this case did not deliberately withhold Miranda warnings. This finding of fact is supported by competent substantial evidence in the record. Because of this finding of fact, the standard enunciated in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), applies here. The majority's holding is contrary to the well-settled Florida law that Elstad applies in these circumstances. See, e.g., Davis v. State, 990 So.2d 459, 466 (Fla. 2008). Under the Elstad standard, Ross's confession after the Miranda warnings is admissible. Accordingly, I respectfully dissent.[32]

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[32] I agree with the majority that the statements made by Ross on January 9, once he was confronted with the evidence of blood on his pants, but before the Miranda warnings were given, are inadmissible. However, that error was harmless. Before the Miranda warnings on January 9, Ross did not confess. Rather, Ross merely admitted that, because he could not remember, it was possible that he killed his parents, but that he did not believe that he had done so. There is not a reasonable possibility

I. The Officers Did Not Deliberately Withhold Miranda

As the Seventh Circuit Court of Appeals accurately explained, "[t]he question of whether the interrogating officer deliberately withheld Miranda warnings will invariably turn on the credibility of the officer's testimony in light of the totality of the circumstances surrounding the interrogation. This is a factual finding entitled to deference on appeal...." United States v. Stewart, 536 F.3d 714, 719-20 (7th Cir. 2008). Moreover, as this Court has explained, "[a]n appellate court reviewing a ruling on a motion to suppress presumes that a trial court's findings of fact are correct and reverses those findings only if they are not supported by competent, substantial evidence." Cuervo v. State, 967 So.2d 155, 160 (Fla. 2007) (citing Connor v. State, 803 So.2d 598, 608 (Fla. 2001)).

Here, the trial court's finding that the officers did not deliberately withhold Miranda warnings is supported by competent substantial evidence in the record. For example, Detective Waldron testified at the evidentiary hearing that he was trained by the Manatee County Sheriff's Office to read a suspect the Miranda warnings "[a]t a point in time where a person's not going to be free, their movements are restricted and they're not just free to get up and walk out." And, when asked on cross-examination why he waited until the latter part of January 9 to read Ross

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that these equivocal statements affected the verdict given the admissible evidence in this case, including his parents' blood on his pants and his confession after the Miranda warnings.

his Miranda rights, Detective Waldron responded as follows:

> Earlier on there still was insufficient evidence or enough in my mind probable cause to charge Blaine Ross. And he had requested to talk about what had been discussed on the news and the news media, so my intention was to answer his questions and to try to see if his statement wavered at all from what his previous statement was. And then if there was any indication or inconsistencies or anything incriminating, then at that point in time I felt there would be probable cause to arrest him, which would necessitate the reading of Miranda.

Additionally, the record reflects that Detective Waldron read Ross the Miranda warnings after learning that a bloody ski mask had been discovered in Ross' car, evidence that Detective Waldron thought provided probable cause at the time. After a break and immediately before advising Ross of his Miranda rights, Detective Waldron reentered the interview room and stated to Ross, "There's a couple of things that I discovered, and before we go any further I want to cover this with you...." Once Detective Waldron fully explained Ross' rights, ensured that Ross understood his rights, and Ross waived those rights, Detective Waldron immediately proceeded to ask Ross about the ski mask that the police found in his car. Accordingly, there is competent substantial evidence in the record to support the trial court's factual finding that the

officers did not deliberately delay Miranda warnings and did not engage in a calculated strategy to secure an unwarned confession that could then be used to secure a warned confession.

Instead of deferring to this factual finding, the majority extensively reweighs the evidence and reevaluates the credibility of Detective Waldron. For example, the majority recognizes that at the evidentiary hearing "Detective Waldron stated that he did not provide Miranda warnings earlier because he did not believe that he had probable cause to arrest Ross." Majority op. at 54. However, despite this testimony that supports the trial court's finding of fact, the majority concludes that "Detective Waldron clearly knew he had probable cause to arrest Ross at that time." Id. The majority reaches its contrary finding, which evaluates the credibility of Detective Waldron's testimony, by focusing upon a supposed conflict between Detective Waldron telling Ross during questioning that Ross was not under arrest and Detective Waldron's evidentiary hearing testimony that that he did not believe he had probable cause until the discovery of the bloody ski mask in Ross' car. Id. ("According to Detective Waldron, it was the discovery of the ski mask that allegedly provided this probable cause and prompted Detective Waldron to advise Ross as to his rights. Yet at this very point during the interrogation, when Ross asked if he was being arrested, Detective Waldron explicitly denied it...."). Of course, a police officer's intent during questioning a suspect often conflicts with what the police officer actually tells the suspect. See, e.g., Davis v. State, 859 So.2d 465, 472

(Fla. 2003) (finding a confession voluntary even though defendant claimed officers stated that they were investigating a missing person's case when the officers were actually investigating a murder). However, in this case, the conflict that the majority reaches is not even a conflict. A police officer can have probable cause to arrest a suspect, but not formally place the suspect under arrest.

Further, the majority gives great weight to testimony that it was the department's policy to administer Miranda warnings once questioning took on an accusatory nature. See majority op. at 42. However, the majority apparently discounts other testimony regarding the policy that was before the trial court charged with making factual findings. Specifically, while both Detective Waldron and another officer testified that there was a "general order" that stated that Miranda warnings were to be provided once accusatory questioning occurred, both also testified that "general orders" are guidelines and not requirements. In fact, when specifically asked on cross-examination whether he had been trained to administer Miranda warnings once accusatory questioning took place, Detective Waldron stated that he was taught that it depends upon the particular circumstances. Detective Waldron also testified that the manner in which he questioned Ross did not violate department policy.

It was improper for the majority to discard the trial court's factual finding regarding deliberateness and reevaluate the evidence for itself, particularly since this factual finding is heavily based upon a

determination of Detective Waldron's credibility. See Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976) ("[T]he function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence...."). Whether this Court properly defers to the trial court's deliberateness finding is important in this case because it determines whether this Court properly applies the standard from Elstad or erroneously applies the standard from Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

II. Elstad Applies, Not Seibert

In Elstad, 470 U.S. at 310-11, the United States Supreme Court held that the failure to provide Miranda warnings before an uncoerced confession does not necessarily render a second and warned statement inadmissible.[33] Rather, the admissibility of the second statement is governed by whether the subsequent waiver was voluntary and knowing. Elstad, 470 U.S. at 309, 105 S.Ct. 1285. If a defendant is fully informed of and voluntarily waives

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[33] In this case, on January 9, Ross went to the police station on his own and voluntarily met with Detective Waldron. In fact, prior to this meeting, Ross had left several phone messages for Detective Waldron indicating his desire to discuss the case with the detective. Therefore, Ross' statements on January 9 prior to the Miranda warnings were uncoerced.

his Miranda rights, the statement after the Miranda warnings is admissible. See Davis v. State, 698 So.2d 1182, 1189 (Fla. 1997) ("Shortly after confessing in his holding cell, Davis gave a taped statement in which he voluntarily gave the same information contained in his prior statement.... This [second] statement was clearly admissible because Davis was fully informed of (and waived) his Miranda rights before the start of the taping session." (citing Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222)). Whether the second statement was voluntary requires a review of the totality of the circumstances. See Ramirez v. State, 739 So.2d 568, 575-76 (Fla. 1999) (applying Elstad).

The United States Supreme Court addressed this area of the law again in Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643. The United States Supreme Court held that a second confession was inadmissible when a police officer intentionally questioned a suspect without administering Miranda in order to elicit an unwarned confession that was then used to elicit a second warned confession. The plurality explained the following:

> The threshold issue when interrogators question first and warn later is ... whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they

> reasonably convey that he could choose to stop talking even if he had talked earlier?

Seibert, 542 U.S. at 611-12. The plurality then listed several factors to assist in determining whether the Miranda warnings were effective:

> the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. However, Justice Kennedy's concurrence in Seibert is dispositive as he provided the necessary fifth vote and the narrowest grounds. See Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Justice Kennedy explained in his concurrence that he "would apply a narrower test applicable only in the infrequent case." Seibert, 542 U.S. at 622, 124 S.Ct. 2601. Specifically, Justice Kennedy set forth the following test:

> The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.

> Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver. For example, a substantial break in time and circumstances between the prewarning statement and the Miranda warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Cf. Westover v. United States, decided with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.

Id.

The majority is improperly mixing the Elstad and Seibert standards together; rather, these are separate standards applicable in different circumstances. See, e.g., majority op. at 57 ("[A]s addressed in both Elstad and Seibert, courts review the circumstances surrounding both the warned and unwarned statements including 'the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [interrogations], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.' " (quoting Seibert, 542 U.S.

at 615, 124 S.Ct. 2601 (plurality opinion) and citing Elstad, 470 U.S. at 310, 105 S.Ct. 1285); majority op. at 39-40 ("The caselaw demonstrates that the analysis of the admissibility of statements made following a custodial interrogation and after the delayed administration of Miranda warnings is one of the totality of the circumstances, with the following being factors important in making this determination: (1) whether the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement; (2) whether the police minimized and downplayed the significance of the Miranda rights once they were given; and (3) the circumstances surrounding both the warned and unwarned statements including 'the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [interrogations], the continuity of the police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.' " (footnotes omitted) (citing Elstad, 470 U.S. at 314, 105 S.Ct. 1285; Davis, 859 So.2d at 471 and quoting Seibert, 542 U.S. at 615, 124 S.Ct. 2601 (plurality opinion)).

It is important to recognize that the standard enunciated in Elstad and the standard enunciated in Seibert are different, coexisting standards. As Justice Kennedy's opinion in Seibert explains, "[t]he admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was

employed." Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment). Elstad solely requires an inquiry into whether the defendant voluntarily and knowingly waived his Miranda rights before the second confession. See Elstad, 470 U.S. at 309, 105 S.Ct. 1285 ("Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made."). In contrast, the Seibert standard presumes that the Miranda warnings before the second confession were ineffective. See Seibert, 542 U.S. at 617, 124 S.Ct. 2601 ("These circumstances must be seen as challenging the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk."); Id. at 620 (Kennedy, J., concurring) ("As Justice Souter points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made."). Due to this presumption, the Seibert standard as enunciated in Justice Kennedy's dispositive concurrence includes an inquiry into the additional "curative" factors listed above (such as the break in time and circumstances between the first and second statements), which are beyond the voluntariness inquiry required by Elstad.

It is well-settled under Florida law that we apply Elstad as distinct from Seibert. This Court held in Davis v. State, 990 So.2d 459, 466 (Fla. 2008)

(quoting Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment)), that we apply Elstad unless officers used "the question-first method 'in a calculated way to undermine the Miranda warning.' " Specifically, in Davis, 990 So.2d at 464-66, this Court addressed the postconviction argument that the defendant's confession was taken in violation of Seibert. However, because the officers did not deliberately withhold Miranda in a calculated attempt to undermine the warnings, this Court held that Elstad applied to the defendant's confession, not Seibert. Davis, 990 So.2d at 466; see also Tengbergen v. State, 9 So.3d 729, 735 (Fla. 4th DCA 2009) ("[U]nless the officers deliberately withheld warnings, Elstad controls Tengbergen's Miranda claim."); Jump v. State, 983 So.2d 726, 729 (Fla. 1st DCA 2008) ("[T]hese principles of Elstad continue to control 'unless the deliberate two-step strategy was employed.' " (quoting Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment)); State v. Lebron, 979 So.2d 1093, 1096-97 (Fla. 3d DCA 2008) ("Justice Kennedy went on to say, 'The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed.' That portion of Justice Kennedy's concurrence is decisive here, for there was no deliberate use of the two-step strategy under the circumstances of the present case." (quoting Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment))); State v. Pitts, 936 So.2d 1111, 1136 (Fla. 2d DCA 2006) ("When we consider the interrogation of Pitts under the test articulated in Seibert by Justice Kennedy, we can

readily conclude that Pitts' post-Miranda statements should not be suppressed. The record before us does not show that 'the two-step interrogation technique was used in a calculated way to undermine the Miranda warning.' " (quoting Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment))).

The Seventh Circuit aptly summarized the state of the law regarding two confessions with an intervening Miranda waiver as follows:

> What emerges from the split opinions in Seibert is this: at least as to deliberate two-step interrogations in which Miranda warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of Elstad has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second. According to the plurality, the multifactor test-timing and location of interrogations, continuity of police personnel, overlapping content of statements, etc.-measures the "effectiveness" of midstream Miranda warnings and applies in all cases involving sequential unwarned and warned admissions. In Justice Kennedy's view, however, an inquiry into change in time and circumstances between the prewarning and postwarning statements-what he called "curative steps"-is necessary only in cases involving the deliberate use of a two-step

> interrogation strategy calculated to evade the requirements of Miranda. Justice Kennedy thus provided a fifth vote to depart from Elstad, but only where the police set out deliberately to withhold Miranda warnings until after a confession has been secured. Where the initial violation of Miranda was not part of a deliberate strategy to undermine the warnings, Elstad appears to have survived Seibert.

Stewart, 388 F.3d at 1090; [34] see also United States v. Mashburn, 406 F.3d 303, 309 (4th Cir. 2005) ("The admissibility of postwarning statements is governed by Elstad unless the deliberate 'question-first' strategy is employed. If that strategy is deliberately employed, postwarning statements related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statements are made." (citation and footnote omitted)).

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[34] The Seventh Circuit has yet to decide exactly how it will apply Seibert. In its most recent opinion on the subject, the Seventh Circuit decided that the statements at issue would be admissible under any possible rule from Seibert. United States v. Heron, 564 F.3d 879, 885 (7th Cir. 2009) ("We have no need here to resolve once and for all what rule or rules governing two-step interrogations can be distilled from Seibert. This is because Heron's May 11 statements would be admissible under any test one might extract."). However, the Seventh Circuit in Heron repeated its prior statement that Elstad survives Seibert and again deferred to the trial court's finding of fact that the delay in Miranda warnings was not deliberate. Id. at 885-86.

As the majority explains in footnote nine, there is a split among the federal circuits regarding the applicability of Justice Kennedy's concurrence in Seibert. However, no such split exists in the State of Florida. This Court as well as four district courts of appeal have all held that Justice Kennedy's concurrence in Seibert is the law in Florida. Stated otherwise, prior to this decision, this Court and the First, Second, Third, and Fourth District Courts of Appeal have all applied the standard enunciated in Justice Kennedy's concurrence in Seibert, not the standard enunciated in the plurality's opinion. Davis, 990 So.2d at 465-66 (quoting and applying Justice Kennedy's concurrence in Seibert and recognizing that "Justice Kennedy stated that he would apply a narrower test than the plurality"); Tengbergen, 9 So.3d at 735 ("Florida courts have heretofore applied Justice Kennedy's rule [in Seibert], as it represents the narrower view."); Jump, 983 So.2d at 728 (applying Justice Kennedy's concurrence in Seibert-not the plurality opinion-because, "[a]s our sister courts have recognized, Justice Kennedy's concurring opinion in Seibert offers the narrowest grounds"); Lebron, 979 So.2d at 1096 ("Justice Kennedy's opinion concurring in the judgment is the dispositive opinion. Addressing the exact issue now before us, Justice Kennedy stated that 'it would be extravagant to treat the presence of one statement that cannot be admitted under Miranda as sufficient reason to prohibit subsequent statements preceded by a proper warning.' " (quoting Seibert, 542 U.S. at 620, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment)); Pitts, 936 So.2d at 1136 ("[T]he holding of Seibert should be viewed as the position taken by

Justice Kennedy, which articulates the 'narrowest grounds' for the judgment of the Court."). Consequently, the majority opinion is receding from this Court's precedent as well as overruling the four district courts' decisions by improperly mixing together the standard in Elstad, Justice Kennedy's standard in Seibert, and the plurality's standard in Seibert.[35]

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[35] The majority cites the following language from Elstad as its support that Elstad requires an examination of the same factors as the plurality in Seibert would require: "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Majority op. at 31 (quoting Elstad, 470 U.S. at 310, 105 S.Ct. 1285 (citing Westover v. United States, decided together with Miranda, 384 U.S. at 494, 86 S.Ct. 1602)). However, this language does not apply every time there are two confessions with an intervening Miranda waiver. Rather, this language referencing Westover only applies after a determination that the pre-Miranda statements were coerced, which was not the case in Elstad. As the United States Supreme Court explained in Elstad,

> [t]he failure of police to administer Miranda warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. See New York v. Quarles, 467 U.S., at 654, and n. 5; Miranda v. Arizona, supra, at 457. Of the courts that have considered whether a properly warned confession must be suppressed because it was preceded by an unwarned but clearly voluntary admission, the majority have explicitly or implicitly recognized that Westover's requirement of a break in the stream of events is inapposite. In these circumstances, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible. The

In this case, because of the trial court's factual finding that the withholding of Miranda warnings was not deliberate, Elstad applies. See Mashburn, 406 F.3d at 309 ("Here, the district court found no evidence that the agents' failure to convey Miranda warnings to Mashburn was deliberate or intentional. Therefore, the admissibility of Mashburn's statements is governed by Elstad." (citations omitted)). Applying Elstad's voluntariness inquiry, I believe this case is analogous to Davis v. State, 859 So.2d 465 (Fla. 2003).

In Davis, this Court applied Elstad and held that a second confession given after Miranda warnings was voluntary and therefore admissible. Davis, 859 So.2d at 471-72. The defendant admitted that he killed the victim in an initial discussion with officers. Id. at 471. Then, an officer administered Miranda warnings, and Davis signed a written waiver. Id. Thereafter, Davis gave a recorded confession. Id. In ruling that the recorded confession

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> warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will." Wong Sun v. United States, 371 U.S., at 486.

Elstad, 470 U.S. at 310-11 (footnote omitted). Indeed, in Elstad, the United States Supreme Court reversed the Oregon court's holding that, despite the fact that the pre-Miranda statements were uncoerced, "lapse of time, and change of place from the original surroundings are the most important considerations" in determining the admissibility of the post-Miranda statements. Id. at 303 (quoting State v. Elstad, 61 Or.App. 673, 658 P.2d 552, 554 (Or.App. 1983), rev'd, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), which cited Westover v. United States, 384 U.S. 436, 496, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

was admissible, this Court stressed that the officers "carefully read Davis his Miranda rights, explaining each section of the waiver form, clearly reading aloud and explaining each right, and confirming after each right that Davis understood." Id. at 472. This Court also noted that Davis signed a written waiver and that the officers did not attempt to downplay the Miranda warnings. Id.

As in Davis, here, Detective Waldron carefully read Ross' Miranda rights to him, asked if he understood those rights, obtained a written waiver, and then asked if Ross wished to talk to him. Ross stated that he did.[36] Only then did the interview proceed. "In these circumstances, a careful and thorough administration of Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible." Elstad, 470 U.S. at 310-11. Therefore, like the second confession in Davis, Ross' post-Miranda confession was voluntary and admissible. See id. at 311 ("The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.' " (quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

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[36] Contrary to the majority's characterization of this conversation on pages 51 and 55, it is clear from the transcript that Ross was not attempting to invoke his right to remain silent. Ross initially stated, "I can't tell you anything different." (Emphasis added.) He did not say that he would not talk. Instead, after he was directly asked, "You're indicating that you want to talk to me; correct?" Ross responded, "Yes." Ross then signed the written waiver.

III. Conclusion

I would defer to the trial court's factual finding that the officers in this case did not deliberately withhold the Miranda warnings because this finding is supported by competent substantial evidence. As a result, I would employ the Elstad standard, which applies to nondeliberate delays in Miranda warnings. See Davis, 990 So.2d at 466 (holding that we apply Elstad unless officers used "the question-first method 'in a calculated way to undermine the Miranda warning.' " (quoting Seibert, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring in the judgment))). Under a proper application of the Elstad standard, Ross' post-Miranda confession is admissible. The trial court did not err in denying Ross' motion to suppress it.

Accordingly, I respectfully dissent.

CANADY and PERRY, JJ., concur.

An Appeal from the Circuit Court in and for Manatee County,

Edward Nicholas, Judge - Case No. 2004-CF-106

James Marion Moorman, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Bill McCollum, Attorney General, Tallahassee, Florida, and Carol M. Dittmar, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff

vs. Case No. 04 CF 106

BLAINE ROSS,
Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION AND AMENDED MOTION TO SUPPRESS STATEMENTS, ADMISSIONS, OR CONFESSIONS

This matter is before the Court on Defendant's Motion and Amended Motion to Suppress Statements, Admissions, or Confessions, in which he seeks to suppress all statements provided to law enforcement, as well as evidence recovered as a result therefrom. The Court conducted an evidentiary hearing over the course of several days between April and August 2006. Having heard the arguments of the parties, reviewed the case law, and considered all of the testimony and evidence, the Court finds and rules as follows.[1]

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[1] The Court will refer to the more than 1100 pages of transcripts by volume and page number, e.g., Vol. 1, p. 32. The

This is a capital case involving two counts of first-degree murder. Trial is scheduled for April 2007. The State alleges that in the late night/early morning hours of January 6-7, 2004, Defendant, who was then twenty-one years old, fatally struck both of his parents, Richard and Kathleen Ross, with a blunt object. On Wednesday, January 7, 2004, Defendant called 911 to report that he discovered his parents covered in blood and apparently dead in the master bedroom of their home in Bradenton. Law enforcement commenced an investigation, during which they interviewed Defendant six times. Defendant seeks to suppress statements he made during these interviews, and all "fruit of the poisonous tree." In support thereof Defendant argues, *inter alia*, that law enforcement coerced him into confessing, he was never advised of his *Miranda*[2] rights, and was not otherwise capable of waiving his rights.

A. Factual Background

Defendant called 911 at approximately 1:15p.m. on January 7, 2004. After law enforcement arrived, Defendant was taken to the Manatee County Sheriff's Office ("MCSO") Criminal Investigation

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Court notes, however, that Volume I covers the portion of the hearing that occurred on the morning of April 24, 2006; Volume 2, the afternoon of April 24, 2006; Volume 3, the morning of April 27, 2006; Volume 4, the afternoon of April 27, 2006; Volume 5, the morning of April 28, 2006; Volume 6, the afternoon of April 28, 2006; Volume 7, May 3, 2006; Volume 8, May 4, 2006; Volume 9, June 16, 2006; and Volume 10, August 31, 2006.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Division ("CID") in Palmetto.[3] Between the afternoon of January 7th and the pre-dawn hours of January 8th, law enforcement, including Detective William Waldron ("Waldron"), interviewed Defendant four times: (1) 2:49 p.m.-3:25 p.m. (36 minutes);[4] (2) 7:41 p.m.-8:27 p.m. (46 minutes);[5] (3) 11:53 p.m.-1:10 a.m. (one hour, 17 minutes);[6] and (4) 1:22 a.m. to 2:36 a.m. (one hour, 14 minutes), for a total of 3 hours, fifty-three minutes.[7]

During these interviews, Defendant sat in a room located on the second floor,[8] with a conference table in the center, chairs along the perimeter, a television, and a couple of blackboards.[9] The door to the room was closed,[10] and each interview was audiotaped. Defendant remained at CID in between the interviews. After the last interview, Waldron

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[3] Palmetto is across the Manatee River from Bradenton.

[4] Vol. 4, pp. 394-420. *See* State's Exhibits 8 and 8A.

[5] Vol. 5, pp. 43 3-69. *See* State's Exhibits 6 (at pp. 1 to 36) and 9.

[6] Vol. 5, pp. 474-532. *See* State's Exhibits 6 (at pp. 36 to 87), 11A, and 11B.

[7] Vol. 2, p. 212; Vol. 5, pp. 533-84. *See* State's Exhibits 6 (at pp. 87 to 140), 11B, and 11C. However, Defendant was physically at CID for a total of approximately twelve hours.

[8] MCSO's CID is located on the second floor of a five-story building. *See* Vol. 2, p. 172. To get to the second floor, one must either "have an access card, or . . . call the party [they're] going to meet . . . to come down and escort [them]." Vol. 4, pp. 391-92. Once on the second floor, however, no pass card or other assistance is needed to go down the elevator or exit the building. *id.* at 392.

[9] Vol. 4, p. 393; Vol. 7, p. 669; Vol. 10, p. 7.

[10] Vol. 10, p. 7.

drove Defendant to the home of Erin Dodds ("Erin") to spend the night.[11]

Between the time Waldron dropped Defendant off at the Dodds's home and January 9th Defendant left several voice mail messages for Waldron. On January 9th, Defendant returned to CID and met with the victim's advocate and Waldron. Waldron conducted that interview in a room smaller than the room used for the January and interviews. It was during this interview that Defendant ultimately made admissions.

Defendant was arrested, and during his first appearance on January 10th, he was appointed an attorney.[12] On January 12th at approximately 10:15 a.m., Defendant signed an "Invocation of Constitutional Rights" form, in which he invoked his right to remain silent and right to counsel.[13] Waldron subsequently received a message that Defendant wanted him to "come up to the jail and see him."[14] Waldron went to the Manatee County Jail on the afternoon of January 12th and spoke with Defendant without his attorney present.

B. Standard of Review for Defendant's *Miranda* claims

"It is well-settled that the safeguards provided by *Miranda* apply only if an individual is *in custody*

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[11] Vol. 5, p. 585-86. Erin was Defendant's then sixteen-year-old girlfriend. Her mother, Teri, had already agreed to let Defendant spend the night there. *See* Vol. 5, p. 585.

[12] *See* Defendant's Exhibit 33.

[13] Vol. 10, p. 11.

[14] Vol. 7, pp. 791-92.

and is subject to interrogation." *State v. Weiss*, 935 So. 2d 110, 116 (Fla. 4th DCA 2006) (emphasis added). "It is *custodial* interrogation — not mere questioning — that triggers *Miranda*'s requirement of the advisory warning that must be given to a suspect before questioning begins," *State v. Shell*, 932 So. 2d 628, 630 (Fla. 2d DCA 2006) (emphasis added), and "[n]ot every encounter between a citizen and police is custodial." *Weiss*, 935 So. 2d at 116.

"Interrogation takes place . . . when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response." *Shell*, 932 So. 2d at 632 (quotation and citation omitted). "Custodial" interrogation, however, is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The test for determining whether a person is "in custody" is "whether a reasonable person placed in the same position would believe that his . . . freedom of action was curtailed to a degree associated with actual arrest." *Mansfield v. State*, 758 So. 2d 636, 644 (Fla. 2000). "A 'reasonable person' [is] . . . one who is neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *Alioto v. State*, 588 So. 2d 17, 18 (Fla. 5th DCA 1991). This test is an objective one, *see Weiss*, 935 So. 2d at 116, and in making its determination the Court should consider four factors:

> (1) the manner in which police summon the suspect for questioning; (2) the purpose, place,

> and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Ramirez v. State, 739 So. 2d 568, 574 (Fla. 1999).

"In considering the light shed by the *Ramirez* factors on whether a reasonable person in the suspect's position would have considered himself to be in custody, the four-factor test must be understood as simply pointing to components in the totality of the circumstances surrounding an interrogation." *State v. Pitts*, 936 So. 2d 1111, 1124 (Fla. 2d DCA 2006). The totality of the circumstances question "is one of mixed fact and law." *Weiss*, 935 So. 2d at 116. The "circumstances surrounding the interrogation" is a "distinctly factual" question, while the determination of whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave" "calls for application of the controlling legal standard to the historical facts." *Id.*

C. Standard of Review for Coerced Confession Claims

"For a confession to be admissible, it must be made voluntarily." *Edwards v. State*, 793 So. 2d 1044, 1047 (Fla. 4th DCA 2001). "The burden is upon the state to prove by a preponderance of the evidence that the confession was freely and voluntarily given." *Sawyer v. State*, 561 So. 2d 278, 281 (Fla. 2d DCA 1990). "In order to find that a confession is involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was coercive police conduct," and "[p]olice coercion

can be not only physical, but psychological." *Id.* at 281. "[I] light of 'the totality of the circumstances' surrounding the confession, [the] coercive police activity [must have] produced that confession." *Id.* at 285. In other words, "there must be a causal nexus between the improper conduct or questioning and the confession." *Edwards*, 793 So. 2d at 1047.

In determining whether a confession was coerced, the Court should consider, *inter alia*, (1) whether the confession was given in the coercive atmosphere of a station-house setting; (2) whether the police suggested the details of the crime to the suspect; (3) whether the suspect was subjected to a barrage of questions during predawn hours and not given an opportunity to sleep or eat; (4) whether psychological coercion was applied; (5) whether the police made threats, promises of leniency, or made statements calculated to delude the suspect as to his or her position; (6) whether the police made threats of harm; and (7) whether the police exerted undue influence or made direct or implied promises of benefits. *See Sawyer*, 561 So. 2d at 28 1-82. "Furthermore, an accused's emotional condition is an important factor in determining whether statements were voluntarily made." *Id.* at 282. "Although particular statements or actions considered an individual basis might not vitiate a confession, when two or more statements or courses of conduct are employed against a suspect, courts have more readily found confession to be involuntary." *Id.* at 28 1-82.

D. January 7th and 8th Interviews and 9th Interview

The Court does not find that the conduct of any of the detectives during the interviews on the 7th and 8th coerced Defendant into confessing on the 9th, as the second element, i.e., the "causal nexus between the improper conduct or questioning and the confession," cannot be met. Defendant denied any involvement in the death of his parents throughout the January 7th and 8th interviews, and in fact did not confess until the evening of January 9th, more than forty hours after the end of the last interview in the pre-dawn hours of January 8th. The Court finds that this significant hiatus from the interview room and the police station, and the fact that Defendant re-initiated contact with Waldron, was enough to break any causal link between the conduct of the detectives on the 7th and 8th and Defendant's ultimate confession on the 9th. Thus, as to the January 7th and 8th interviews, the Court will address only the *Miranda* arguments.

1. **January 7, 2004 between 2:49 p.m. and 3:25 p.m.**

Defendant does not challenge the 2:49 interview. In fact, Defendant's expert, Dr. Gregory DeClue ("Dr. DeClue"), opined that "[t]here's nothing from the transcript itself or from the tape that [he] heard that would communicate to [Defendant] that he was a suspect in this case."[15] The Court agrees, and thus denies Defendant's motion as to this interview. Because what occurred before, during, and after the interview relates to the "totality of the

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[15] Vol. 9, pp. 17-19.

circumstances" for the remaining interviews, however, the Court will address those facts.

After Defendant called 911 on January 7th, law enforcement arrived at the Ross home, and members of the media arrived soon thereafter.[16] After speaking with some neighbors, Waldron approached the home and found Defendant trying to avoid the media by "crouching down behind a pickup truck that was parked in front of the residence, smoking a cigarette.[17] Defendant asked if they could go somewhere and talk, and Waldron suggested they go to MCSO's CID so they "could get away from the media and. . . talk.[18] Defendant "agreed and thought that would be a good idea," and in fact thanked Waldron for "getting him out of there."[19] At this point, it was not clear whether the Rosses were the victims of homicide.[20]

Waldron transported Defendant to CID, and as they approached a bridge to cross into Palmetto, Defendant asked "Are you taking me to jail?"[21] Defendant also stated that he had had plans to go to

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[16] Vol. 4, pp. 389-90.

[17] Vol. 4, p. 390.

[18] Vol.4, p. 391. It is routine procedure to interview the first person to find a deceased body, and those interviews are typically done at the sheriff's department. *See* Vol. 3, p. 283.

[19] Vol. 4, p. 391; Vol. 5, pp. 528, 562. The Court does not agree with Defendant that Waldron "directed [him] to go to CID for questioning." Vol. 10, p. 85. The Court finds that Defendant went voluntarily after being asked by Waldron if he wanted to do so.

[20] Vol. 4, p. 392.

[21] Vol. 3, p. 283.

Cape Coral with Erin that day.[22] Upon their arrival at CID and before entering the building, Waldron and Defendant each had a cigarette.[23] Once they got upstairs to CID, and before they started the interview. Waldron offered Defendant a drink.[24] Waldron did not indicate in any manner that Defendant was a suspect prior to this interview.[25] During the interview, Defendant sat in a 20' x 25' room that had several chairs along one wall and a long conference table in the center, and was interviewed only by Waldron.[26] During the interview, while Waldron sat at the head of the table, Defendant sat to his left between the table and the unlocked door, closest to the door.[27]

After the interview, Waldron and Defendant took another cigarette break outside.[28] During this break, Defendant asked Waldron about the status of the investigation, and told him that he had been taking Xanax, smoking marijuana, and drinking beer for the past few days, and that as a result he did not remember what he had been doing during that

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[22] Vol. 3. p. 283..

[23] Vol. 4, p. 392.

[24] Vol. 4, p. 392.

[25] Vol. 4, p. 392-93.

[26] Vol. 4, pp. 393, 395. Apparently, while Waldron interviewed Defendant, Detective Mike Schue ("Schue") interviewed Erin. *See* Vol. 3, pp. 287, 290, 291.

[27] Vol. 4, p. 393.

[28] Vol. 4, p. 420. It seems to the Court that at least at this point, Defendant learned that one does not need a pass to leave the building.

time.[29] Waldron called his son on his cell phone during this break. Furthermore, the two stood "a couple of feet apart." Defendant was not restrained in any way, and nothing physically prevented him from leaving.[30]

After the break, Waldron explained to Defendant that he would like to "ask him some more questions, [and] find out if his parents had any enemies [or] if there was anyone that had it out for his mother or father or the family itself."[31] At that point, they went back upstairs, and Waldron showed Defendant the location of the restroom, "asked [him] if he wanted anything to eat, if he wanted anything to drink, [and] showed him [the location of] the water cooler. . . [and] the coffee pot. . . ."[32] Defendant waited in the CID common area,[33] and while he waited he was free to roam around, not physically barred from leaving, and not closely watched.[34]

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[29] 29 Vol. 3, p. 284; Vol. 4, p. 420.

[30] Vol. 4, p. 420-21.

[31] Vol.4, p.423.

[32] Vol. 4, p. 423.

[33] To get to the common area in January 2004, one had to come upstairs by way of the elevator and go through a set of double doors. Vol. 4, p. 423. The common area, which is the closest room to the elevators, contained a large round table that usually had the newspaper on it, an area for the copying machine, a small room for the water cooler and coffee maker, and an area for secretaries' and detectives' desks. Vol. 4, p. 424; Vol. 7, pp. 834-36.

[34] Vol. 4, pp. 423-25. However, because secretaries and other non-law enforcement personnel left at 5:00, Defendant argues that only law enforcement officers were there after 5:00. *See* Vol. 7, pp. 833-34. Although Defendant argues that at least four

In the meantime, Erin had also been transported to CID,[35] and at some point after the 2:49 interview Defendant had contact with her while he waited in the common area.[36] Waldron gave Defendant the standard instruction that he should not discuss with Erin "anything pertaining to the case, [or] the events of [January 7th leading up to discovering the Rosses dead inside their home. . . [37] Waldron told Defendant that the reason for this was that he "didn't want anything to come back later, when [they] finally did identify a suspect. . . ."[38]

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detectives may have been present, there is no evidence that those detectives were supervising Defendant or preventing him from leaving. Rather, Lt. Keough testified that they would have been working on various tasks related to their own investigations. Vol. 7, p. 838-42.

[35] Vol. 4, p. 425. Erin was in the house with Defendant when he discovered his parents' bodies, and had been with him for most of the preceding 24 hours.

[36] Vol. 4, p. 425. Defendant claims that he "was separated from Erin [] someone with whom he had arrived," and that this fact goes to whether Defendant was in custody. Vol. 10, p. 85. The Court disagrees. In addition to the fact that Defendant did have contact with Erin in the common area, the record shows that while Waldron drove Defendant to CID, *see* Vol. 3, p. 283, Schue drove Erin to CID. *See* Vol. 7, p. 670. Nevertheless, even if Defendant had been separated from Erin during part of the time he waited in the common area, it is basic procedure to keep witnesses separated from each other. *See* Vol. 7, pp. 826-27; Vol. 10, p. 13.

[37] Vol. 4, pp. 425-26.

[38] Vol.9, p29.

2. **January 7, 2004 between 7:41 p.m. and 8:27 p.m.**

After interviewing Teri,[39] and interviewing Erin a second time,[40] Waldron interviewed Defendant a second time, starting at 7:41 p.m.[41] By this point, Defendant had been at CID for approximately 5 hours. This interview occurred in the same conference room as the 2:49 interview, and Waldron and Defendant sat in the same seats -- with Defendant sitting closest to the door.[42] Waldron and Defendant were joined by Schue.[43]

Defendant argues he was in custody during this interview,[44] as the detectives used aggressive interrogation techniques, confronted him with "prior statements" and "evidence that conflicted with his statement," and "accused [him] of changing his story" and "omitting information."[45] The Court finds that Defendant was not in custody during this interview.

When the 7:41 interview began, Waldron told Defendant there were discrepancies between his statement and statements given by other witnesses, and that he "wanted to go over some of that."[46] In the

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[39] Vol. 5, p. 435.

[40] Erin's second interview went from about 6:15 to 7:00 p.m. *See* Vol. 3, pp. 290-306; Vol. 4, pp. 328-48.

[41] Vol. 4, p. 426.

[42] Vol. 4, p. 426.

[43] Vol. 5, p. 434.

[44] Def.'s Br., p. 35; Vol. 10, p. 87.

[45] Def.'s Br., pp. 6-7; Vol. 10, pp. 86-87.

[46] 46 Vol.5, p.435.

ensuing conversation, Defendant restated what he remembered doing over the past few days, explained why his memory was unclear, and tried to clarify some of the discrepancies. Waldron replied with one-word responses such as "okay" or simple follow-up questions.[47]

Waldron thereafter asked Defendant about a statement he made during the 2:49 interview:

> Q: And when we were talking earlier you -- about your observations in the house, and I asked you why you thought it was a burglary, you said you didn't want to say anything incriminating.[48]
>
> A: Right.

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[47] Vol. 5, pp. 435-58, 462-65.

[48] The conversation to which Waldron was referring was:

> Q: Did it look like any other rooms in the house had been disturbed?
>
> A: Ah-hmm, like in my rooms, both of my rooms. I didn't check the kitchen. I assumed that someone was -- jewelry or something like that. You know, that's just what I'm thinking. I don't know. I don't want to incriminate myself, but I --
>
> Q: Why would you --
>
> A: Because I'm saying -- you know? You understand what I'm saying? That I'm saying that I think someone robbed us.
>
> Q: Right.
>
> A: And I have no proof. I didn't search -- I didn't search for anything.
>
> Q: Why do you think that would incriminate yourself?
>
> A: Because that sounds incriminating. That sounds incriminating to me.

Vol. 4, pp. 404-05.

Q: Or you didn't want to sound incriminating.

A: I don't want to just come out and be like, well, yeah, it looks like a robbery because there's this stuff -- you know, the house was ransacked, it looked like someone was looking for something.

Q: Right.

A: And that wouldn't -- that wouldn't actually be. I don't want to say, you know, what the crime is or to put myself there whenever I wasn't. I didn't want to incriminate myself.

Q: Why would that be incriminating?

A: Because I've got a horrible -- I've got a horrible track record. I -- throughout my whole life, my past has always been brought up, and it's always been like -- it feels like that's everybody's angle at me, and I'm very defensive. I'm very defensive. I will say what I -- like say what I have to say to make sure it's like absolutely clear, and I will defend myself, I'll -- I will just -- I'll be open, you know what I'm saying?

Q: Uh-huh.

A: Because I've always got the cards stacked against me.

Q: Okay, this is the first time I ever met you.

A: I know.

Q: I don't know anything about you, other than what you told me. And I just thought it very strange for you to say that to me when we're -- you know, I'm talking to you about what happened to your parents.

A: Uh-huh.

Q: And about what you saw. And you were concerned about saying something incriminating.

A: Right.

Q: And that just struck me kind of funny.

A: That's because I'm a very defensive person. If it was you -- I mean, I've met Detective Schue before, I talked to him. If it was Erin's mom, I'm -- I'm very defensive. I don't want to -- I don't like the spotlight on me.

Q: Well, usually when somebody gets kind of defensive there's something they're trying to hide --

A: There's something to hide, I understand that, but --

Q: Do you have anything to hide?

A: No, I don't have anything to hide.[49]

The conversation proceeded into questions regarding people who may have had problems with the Rosses, and Defendant's relationship with his parents.[50] At that point, Waldron stopped the interview:

Q: All right, tell you what, why don't we take a break, and we'll go downstairs and have a cigarette, and maybe use the restroom. If you want anything to drink, we'll do that

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[49] Vol. 5, pp. 465-67.

[50] Vol. 5, pp. 467-68. Actually, when Waldron asked Defendant whether his parents had any problems with anybody, Defendant referenced problems *he* had with people in the neighborhood.

> right now. Sound good? All right, I'm going to stop the interview.[51]

The Court finds that Defendant was not in custody during this interview, and thus denies the motion as to this interview.

a. Manner in which Defendant was summoned to the interview

Defendant was already at CID, and there is no evidence he was threatened or coerced into submitting to this interview. Waldron originally asked Defendant whether he wanted to go with him to CID both to get away from the media and have a quiet place to talk; Defendant voluntarily went down to the station. In between the 2:49 and 7:41 interviews, Waldron explained that he would like to ask more questions, and speak with him about whether his parents had any enemies.[52] Further, Defendant now had a familiarity with the interview process, as the 7:41 interview occurred in the same

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[51] Vol. 5, p. 469. Defendant argues that when Waldron said this, he essentially told Defendant "what's going to happen is he's going to be allowed to smoke a cigarette and use the restroom and get a drink, he's being told what's going to happen, and none of those are his being told he's going to be able to leave." Vol. 10, p. 87. The Court does not agree with Defendant's interpretation. Waldron does not use commanding language here. Rather, his language was more casual, and more inquisitive than commanding, as Waldron starts with "[a]ll right, tell you what," continues with "*why* don't we take a break . . . and maybe use the restroom," and ends with "sound good?". A reasonable person would have known that if he wanted anything different than that suggested by Waldron, he could have said so.

[52] Vol. 4, p. 423.

room as the 2:49 interview, which Defendant does not challenge. Defendant also knew that the detectives were interviewing other witnesses, such as Teri and Erin.

Defendant notes how long he had been at CID by the time this interview began, but the Court does not find that this length of time would necessarily have contributed to a reasonable person's perception of being in custody. Although by the time the 7:41 interview started Defendant had physically been at CID for about five hours, only 36 minutes were spent being interviewed. *See Pitts*, 936 So. 2d at 1126 (defendant interviewed by detectives and driven to crime scene twice in five-hour time span before advised of rights). As the Court has previously found, the 2:49 interview was non custodial, and was, in fact, fairly conversational. During the other four and one-half hours, Defendant, *inter alia*, had cigarette breaks, had contact with Erin, was free to roam around and was unsupervised,[53] and had access to the restroom, food and other refreshments, and the newspaper.

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[53] Although Defendant makes note of the fact that Det. Bobby Lewis ("Lewis") sat with him before the 7:41 interview, Def's Br., at 4, the Court does not find this fact to be pertinent, as Lewis specifically testified that he "was just sitting" there to make sure Defendant did not wander and make sure Defendant and Erin did not discuss the case, but not for any extended period of time. Vol. 1, pp. 122-23; Vol. 7, pp. 846-47. He only sat there while Erin sat in the common area with Defendant. Vol. 7, pp. 847-48.

b. Purpose, place, and manner of questioning

Defendant argues that he was confronted with discrepancies between statements he made during the 2:49 statement and Erin's statement, and discrepancies between statements he made in the 7:41 and 2:49 interviews.[54] The Court finds that the purpose of the 7:41 interview was both to learn facts and clarify discrepancies that came up between Defendant's and other witnesses' statements. Dr. DeClue agreed.[55] The detectives were conversational, and requested that Defendant be honest and candid. "Instead of pressuring [Defendant] with the threat of arrest and prosecution, [Waldron] appealed to his interest in telling the truth and being helpful to a police officer." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) (appealing to suspect's "interest in telling the truth and being helpful to a police officer" not indicative of custody for purposes of requiring *Miranda* warnings). *See Thompson v. Keohane*, 516 U.S. 99, 103 n.1 (1995) (finding no custody where officer accused defendant of lying).

As for the questions regarding Defendant's statement in the 2:49 interview that he "didn't want to say anything incriminating," the Court does not find that these questions turned the interview into a custodial interrogation. Waldron was asking Defendant to explain why he made such a curious comment which was not prompted by any question that would necessarily elicit such a response. The

[54] *See, e.g.*, Vol. 5, p. 435, 458, 459, 461

[55] Vol. 9, p. 21

question to which Defendant responded was "Did it look like any other rooms in the house had been disturbed?"[56] Because it was unresponsive to the question, the Defendant's response that he didn't "want to say anything incriminating" was a voluntary statement for which the detectives' follow-up questions were appropriate.

Defendant argues that by the 7:41 interview, "the detectives already viewed [him] as a suspect."[57] The record does indeed show that the detectives made statements to Erin during her second interview (which occurred before the 7:41 interview) indicating that they were looking at Defendant.[58] The record, however, does not show that this view was conveyed to Defendant during this interview.

"The mere fact that . . . the questioned person is one whom the police suspect does not mean that a suspect is in custody." *Pitts*, 936 So. 2d at 1123. "The proper inquiry is not the unarticulated plan of the law enforcement officers, but rather how a reasonable person in the suspect's position would have perceived the situation." *Snead v. State*, 913 So. 2d 724, 726 (Fla. 5th DCA 2005). Indeed, "[a] policeman's unarticulated plan *has no bearing on the question. . . .*" *Roman v. State*, 475 So. 2d 1228, 1232

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[56] Vol. 4, p. 404.

[57] Def.'s Br., pp. 5, 35; Vol. 10, p. 87.

[58] *See* Vol. 3, p. 301 ("we're looking at Blaine seriously for this"); Vol. 3, p. 304 ("[i]f you're covering for him. . . you don't need to do that"); Vol. 4, P. 331 ("there's a lot of things here that keep pointing back at Blaine"); and Vol. 4, p. 339 ("[i]f we find out that . . . you're trying to cover for him, then you will get charged with whatever he gets charged with").

(Fla. 1985) (emphasis added). Even if Waldron and Schue had this view, they never disclosed or manifested it, either directly or indirectly, to Defendant during this interview. It thus has no bearing on the custody question. *See Stansbury v. California*, 511 U.S. 318, 323-325 (1994); *United States v. Paige*, 2005 WL 2126328, *10 (M.D. Fla.) (custodial question not decided on subjective views of interrogator).

c. **Whether Defendant was confronted with evidence of his guilt**

The record does not demonstrate that Defendant was confronted with evidence of his guilt during the 7:41 interview.

d. **Whether Defendant was informed he could leave**

Although Defendant was not *directly* informed he *could* leave, he was never informed that he *could not* leave and was not impeded in any way. "[A] suspect need not be advised that he. . . is free to leave in order for the court to determine that the suspect was not in custody." *Shell*, 932 So. 2d at 633. The Court notes, however, that after this interview, Defendant did inquire about leaving, and despite the fact that Waldron told him he could not go home or take his car (because they were part of the crime scene), he did tell him he needed to make other arrangements.[59] This surely was an *indirect* indication that Defendant was free to leave, and

[59] Vol. 5, pp. 472-73.

Defendant understood it as such, as he stated that he may be able to sleep at Erin's.[60]

e. After the interview

At the conclusion of the 7:41 interview, Defendant and Waldron again took a cigarette break in the parking lot.[61] While they were "just walking around," Waldron made a phone call to his son, and Defendant was not handcuffed or restrained in any way.[62] Waldron never indicated to Defendant that he could or could not leave.[63] When they went back upstairs, they saw Lewis, who offered Defendant food.[64]

Between the end of the 7:41 interview and the beginning of the 11:53 interview, Defendant and Waldron "went down a couple more times" to smoke, and upon returning Waldron again offered Defendant refreshments.[65] During one of these breaks, Defendant gave Waldron more information about his familial relationships, and during another, Defendant asked if he could go home that night:[66]

Q (State): And what did you tell him about that?

A (Waldron): I explained to him that his house was a crime scene, that that wouldn't

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[60] *Id.*

[61] Vol. 5, p. 470.

[62] Vol. 5, p. 470.

[63] Vol. 5, p. 471.

[64] Vol. 5, p. 471.

[65] Vol. 5, pp. 471-72.

[66] Vol. 5, pp. 471-73.

be possible since the house was being processed for evidence.

Q: What did you tell him about -- what, if anything, did you tell him about what arrangements he needed to make.

A: I said you need to try to make arrangements, can't you stay with your grandmother.

Q: And what was his response to that as to where he thought he might be able to sleep?

A: He wanted to sleep in his car because he didn't want to call his grandmother.

Q: What did you tell him about the status of his car[67] and whether he could sleep in there at the crime scene?

A: I told him his car was located within the crime scene, and that that would not be a possibility of him sleeping in his car.

Q: And what did he say then about where he might be able to find a place to sleep?

A: He says, well, maybe I can sleep at Erin's house.[68]

After providing more information about his friend, Mike Young ("Mr. Young"), Defendant sat in the common area at the table closest to the elevator by himself.[69] Waldron did not keep a constant watch

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[67] The Court reiterates that Defendant was driven to CID by Waldron, and his car was part of the crime scene. He therefore had no immediate means of transportation.

[68] Vol. 5, pp. 472-73.

[69] Vol. 5, pp. 471-72. There is no evidence regarding whether Defendant asked to, was allowed to, or did, sleep. The Court

on him, and in fact had dinner and made coffee.[70] In the meantime, officers were dispatched to locate Mr. Young, and Waldron interviewed him at CID.[71]

3. January 7th, 11:53 p.m. to January 8th, 1:10 a.m.

After Waldron interviewed Mr. Young, he and Schue interviewed Defendant a third time, beginning at 11:53. Defendant argues that he was "in custody" during this interview because Waldron and Schue employed aggressive interrogation techniques, used an accusatory tone, confronted him with inconsistencies, accused him of omitting information, raised their voices and "angrily yelled" at him, told him they considered him a suspect, distinguished "heat of the moment" and "premeditated" killings, showed him pictures of his parents from the crime scene, and never told him he was free to leave.[72]

By the beginning of the 11:53 interview, Defendant had been at CID for about nine and one-half hours. During the interview, Waldron again told Defendant about the discrepancies, asked him why he failed to disclose certain facts earlier,[73] challenged him on his claims of memory loss, accused him of lying,[74] and queried him about things he did on the

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does not find this to be pertinent, however, as it appears Defendant often stayed up into the early hours of the morning.

[70] Vol. 5, p. 472.

[71] Vol. 5, pp. 472-74.

[72] Def.'s Br., pp. 9-17.

[73] Vol. 5, pp. 478-83, 485, 486, 488-90, 495.

[74] Vol. 5, pp. 508

6th and 7th[75] Defendant also discussed the relationship he had with each of his parents.[76] The Court finds that, considering the totality of the circumstances, a reasonable person would not have felt as though his freedom of action was curtailed to a degree associated with actual arrest during this interview.

a. **Manner in which Defendant was summoned to the interview**

Between the end of the 7:41 interview and the beginning of the 11:53 interview, Defendant had several cigarette breaks outside, was not restrained or supervised in any way, and had been offered the restroom, food and other refreshments.[77] The 11:53 interview occurred after the detectives had an opportunity to interview Mr. Young. Although by this time Defendant had been at CID for approximately nine and one-half hours, only one hour and twenty minutes had been spent in the interview room. In addition, the delay was due to the continued investigation efforts of the detectives, including following up on Defendant's story. Despite being told and understanding prior to the interview that he needed to make arrangements to stay somewhere, there is no indication Defendant explored any options, such as calling friends or family to spend the night or for a ride, until closer to the end of the

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[75] Vol. 5, pp. 483-84, 486, 497.

[76] Vol. 5, pp. 490-94.

[77] Vol. 5, pp. 470-72.

interviews.[78] In fact, there is no indication that he inquired about calling anyone. The Court finds that Defendant voluntarily remained at CID and was not coerced into submitting to the 11:53 interview.

b. **Purpose, place, and manner of questioning**

This interview and the next interview must be taken in the context of the entire day. Defendant was the person who found his parents' bodies and called 911, had possession of his mother's ATM and gas cards, did not know the PIN number to the ATM card because his mother had recently changed it, showed little emotion to law enforcement, made remarks such as "are you taking me to jail" and "I don't want to incriminate myself," gave statements that conflicted with other witnesses' statements and his own previous statements, could not account for his time due to claimed drug- and alcohol-induced memory lapses, had told stories to other people about the money in his mother's bank account, and was planning on a trip to Cape Coral with one of the goals being to purchase drugs. *See Schoenwetter v. State*, 931 So. 2d 857, 867 (Fla. 2006) (no custody where purpose of interrogation demonstrated by fact that defendant appeared nervous, had a cut on his hand, was out on his bike the night before when the person who committed crime left on a bike, and knew the victims). The detectives also knew there were no signs of forced entry in the house, and they indicated

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[78] As noted, Defendant was staying in the common area, which had secretaries' and detectives' desks nearby. Although there is no evidence as to this fact, the Court can fairly assume that some or all of those desks had a phone with outside-line access.

that the scene appeared to have been a staged burglary. The purpose of the interrogation was to determine what Defendant had been doing over the last 24 hours, and perhaps find out who was responsible for the Rosses' deaths. "Such a purpose might lead the police to taking a suspect into custody but that is by no means a necessary consequence." *Pitts*, 936 So. 2d at 1126.

Although the detectives suggested to Defendant they believed he may have been the perpetrator, this did not necessarily subject him to custodial interrogation. "An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned," but "[t]hose beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action." *Stansbury*, 511 U.S. at 325. "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest." *Id. See Pitt*, 936 So. 2d at 1123 (same). "In sum, an officer's. . . beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment of whether that individual was in custody, but only if the officer's. . . beliefs were somehow manifested to the individual under interrogation *and* would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id.* (emphasis added).

At some points, the detectives *suggested* that Defendant was the perpetrator:

(1) Q: Blaine.

A: Yes.

Q: Why did this happen to your parents?

A: I don't know.

Q: You don't know. or you don't remember?

A: I don't know.

Q: *Who would have done this to your parents*?[79]

(2) Q: Blame, someone didn't break into your house.

A: Okay.

Q: Your TV wasn't stolen.

A: Okay, well --

Q: This wasn't a simple breaking of the window. Okay? This isn't a simple VCR being stolen.

A: Right. Is anything missing?

Q: This isn't a burglary. Okay?

A: Okay.

Q: Your parents are dead.

A: I know.

Q: This is a homicide. This is an act of rage, somebody that's very, very upset, to do what was done. It's not a simple do a burglary and get caught and you kill somebody, you shoot them or something like this. This is something

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[79] Vol. 5, pp. 497-98 (emphasis added).

that was clear-cut, either spur-of-the-moment heated rage --

A: So nothing was missing?

Q: -- or cold premeditated --

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Q: You understand, like I said, this isn't just a burglary.

A: No, I think -- I'm not -- I don't want to be an asshole or anything -- excuse me, I don't want -- I see -- I see where you guys are going with this. Urn,

Q: *We want --you know, we just --*

A: I would -- I could never be that mad at my parents.

Q: *Who could?*[80]

(3) A: *** I know that -- that -- that you guys are wrong, that I didn't kill my parents. Because I know that's what you're thinking. I know that's exactly what you guys are thinking. And I know that you guys have dealt with criminals, you deal with them every day. But it would be pretty stupid of me to sit here and show you the ATM card, or show you that I have access to my mom's money, if I did this. Am I right? That is pretty stupid.

Q: *No, not necessarily. Not necessarily.*

A: I think it would be pretty stupid. I'm not some criminal mastermind that has come up with this --

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[80] Vol. 5, pp. 498-500 (emphasis added).

Q: I didn't--

A: -- scheme.

Q: *You're not accused of that.*

A: You don't have to accuse me of it. I mean I can see it in your eyes, I can see it in his eyes, and I -- I can -- I understand the questions. I'm not stupid. I know you guys aren't saying that I'm stupid, but I mean that's how you guys are treating me, and you're treating me like I'm a murderer.

Q: think we've treated you quite well, really.

A: Well, you haye, until this last -- this right here. And I'm sorry, I don't want to be rude, and I don't want to be --

Q: *Blaine, you have to look at it in our point of view. When you talk to someone as long as -- and as many times as we 'ye talked to you, and you can't get a simple 24 hours downpat ** * You did not do that many things during that period of time that you wouldn't be able to remember the simple things that happened.*[81]

(4) Q: You *could have been* so damn high last night, and so full of rage, that you went in there and you killed your parents because they wouldn't give

A: No.

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[81] Vol. 5, pp. 509-10 (emphasis added).

Q: And that's a reason why that credit card wouldn't work, because your mom changed the PIN number to prevent you from taking any more money out of the bank. And you tried to con a teller into giving you the PIN number.

A: Come to my house and find the contract with me.

Q: A contract does nothing, okay? I find it hard to believe that your mom was going to do a contract with you and not give you the new PIN number, And then even after the bank tells you that your mom changed the PIN number two days ago, you still tried to o out and use that credit card again. Now, that doesn't make any sense.[82]

(5) Q: And I just can't begin to understand why -- if you had absolutely nothing to do with this, or nothing to hide, why you would think what you were saying was incriminating.

A: Because I was the one that showed up there, I was the one that found it, and I have my mom's ATM card on me, I have her -- I have her gas card on me, I'm going to be the prime suspect. Am I right? That is --

Q: To me, if you had absolutely nothing to worry about --

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[82] Vol. 5, p. 512 (emphasis added).

A: I don't have anything to worry about.[83]

(6) Q: *** I mean *there could* be a whole bunch of things that happened last night that you don't remember, because of that memory problem.[84]

These suggestions were not definitive, however. In almost the same breath, the detectives also suggest the possibility that someone else may have been the perpetrator, or appeal to Defendant to tell the truth and thus give them a reason not to consider him a possible suspect.

Although not in the form of an outright accusal, the detectives also told Defendant they thought he committed the crime:

Q: We do know what's going on. What we're trying to understand from you is why.

A: I'm trying to help you guys -- I'm trying to help you guys. I know you guys don't want to be sitting here either.

Q: Why did this happen?

A: I don't know.

Q: I think you do know.[85]

In considering these colloquies in the context of the entire interview, including the statements made before the interview that Defendant had to make arrangements to stay somewhere other than his house or car, and the statements made during the interview pertaining to where Defendant was going

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[83] Vol. 5, pp. 526-27.

[84] Vol. 5, p. 520 (emphasis added).

[85] Vol. 5, p. 524.

after the interview,[86] the Court does not find that the detectives' sharing of this information would have led to a reasonable person to believe their freedom was curtailed to the point of actual arrest.

Defendant also argues he was in custody because Waldron differentiated between "premeditated" and "heat of the moment." Again, the Court disagrees. The Supreme Court faced a very similar situation in *Thompson v. Keohane*, where the officer said to the defendant:

> Q: And I don't believe that you're a bad person. I really don't. . . . [W]hat happened here was never planned, what happened here was one of these things that just happen . . . . And when it happened you're stuck with this -- I mean you're stuck with a hell of a mess now. She's got -- she's finally got you into more trouble than she can possibly imagine. I mean she's brought this thing on you. She causes that. . . . I mean I don't know whether she started the thing by grabbing the knife and saying she was gonna (indiscernible) at you and it got turned around or just what happened. I mean I don't know those things.

Thompson, 516 U.S. at 103 n. 1. Despite this revelation to the defendant, in considering the totality of the circumstances, the *Thompson* court did not find that the defendant was in custody.

The bottom line is that "in determining that a suspect was not in custody, it does not have to be

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[86] *See infra*.

found that the environment in which he was questioned was devoid of coercion." *Shell*, 932 So. 2d at 632. Any interview of a suspect by police will have coercive aspects to it, simply by virtue of the fact that the officer is part of a law enforcement system which may cause the suspect to be charged with a crime. *See Weiss*, 935 So. 2d at 116. "[I]t is only when the officer, by means of physical force or show of authority, has in some way *restrained the liberty* of a citizen may we conclude that a 'seizure' has occurred." *Weiss*, 935 So. 2d at 116 (emphasis added). Such restraint did not occur here.

c. Whether Defendant was confronted with evidence of his guilt

"Although not necessarily dispositive, the extent to which the suspect is confronted with evidence of his . . . guilt can be a circumstance that weighs heavily in the balances." *Pitts*, 936 So. 2d at 1127. "A reasonable person in the situation of a suspect who has been 'confronted with evidence strongly suggesting his guilt' may well understand that such evidence means that the police will not allow the suspect go on his way." *Id.* at 1127-1128. The record does demonstrate that Waldron told Defendant that neighbors said they saw his car at the house that morning,[87] there were no signs of forced entry, and the scene appeared to be a staged burglary.[88] The Court does not find that this

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[87] Vol. 5, p. 503.

[88] Assuming that the fact that Defendant had his mother's ATM and gas cards and did not know the PIN number constituted "evidence of his guilt," although it could be argued that he was confronted with this as evidence of his guilt, the Court does not

constitutes evidence that "strongly suggested" Defendant's guilt. Nevertheless, when balanced against the facts indicating Defendant could leave, the Court does not find he was in custody.

d. Whether Defendant was informed he could leave

As with each of the other interviews, Defendant was never handcuffed, physically held, booked, or otherwise searched or restrained. *See Schoenwetter*, 931 So. 2d at 867 (defendant never handcuffed, and was able to exit car when they stopped for snack). There is nothing to suggest that his freedom of movement was curtailed in any manner. Indeed, prior to the commencement of this interview, Waldron specifically told Defendant he needed to make arrangements for somewhere to stay that night, thus suggesting he was free to leave. Surely, the ability to communicate with the outside world mitigated, to some extent, the incommunicado nature of interrogations with which the *Miranda* court was concerned and the psychological pressure associated with being isolated in an interview room.

Furthermore, throughout the interview, there were indications by the detectives that would have been understood by a reasonable person they were free to leave:

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agree. Defendant was not "confronted" with this evidence. To "confront" means "to cause to meet: bring face-to-face." Merriam-Webster Online Dictionary, www.m-w.com/dictionary/confront. The detectives did not "cause" Defendant to learn this information. Defendant already knew this information, and in fact mentioned it to the detectives.

(1) Q: *Where are you going to live now?*

A: Don't know. I mean right now -- right now how I feel, right now at this very second, the way that you guys are making me feeling, I would have no problem sleeping in my car. . . . *** I'll go home, and I'll have some sheriffs there, and I'll search through everything, and I'll find something missing for you guys.[89]

(2) A: So does that mean I'm under arrest?

Q: Blaine, *you don't have handcuffs on*, you're not --

A: Well --

Q: *Has anybody said you're under arrest?*

A: No, but you guys just said that you know what's going on here and that you want to understand.[90]

(3) A: *** You guys take me away from the house, and you bring me down here, you won't let me leave. It's kind of you to let me smoke cigarettes, but I --

Q: Did you ask to leave?

A: No, but I'm pretty sure that I can't.[91] And I'm not going to walk all the way

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[89] Vol. 5, p. 508 (emphasis added).

[90] Vol. 5, pp. 523-24.

[91] This statement by Defendant was an issue at the hearing. *See* Vol. 5, pp. 527.3 1. Although the original transcriber of the statement heard "can," the court reporter heard "can't." Upon a second listening at the hearing, the court reporter again heard "can't." The defense argued that Defendant said "can't," while the State argued he said "can." indeed, the Court admits that it

is difficult to hear what Defendant actually said. The Court originally heard "can" during the hearing, but upon listening to the tape again in chambers, it heard "can't." The Court finds that Defendant said "No, but I'm pretty sure that I *can't*," although, again, it is difficult to determine definitively. Defendant did not testify at the hearing.

This short colloquy demonstrates Defendant's lack of clarity as to whether he could leave. Immediately before saying "I'm pretty sure that I can't [leave]" Defendant said "you won't let me leave," and immediately after saying "I'm pretty sure that I can't [leave]" Defendant said "I mean if it comes down to it [I'll walk home]." The Court agrees with the State that Defendant had been curiously wary. *See, e.g.*, Vol. 3, p. 283 ("Are you taking me to jail?"); Vol. 4, p. 389 (when Waldron arrived at Ross home, Defendant "was kind of quiet, didn't really appear to show any emotion"), and p. 405 ("I don't want to incriminate myself"); Vol. 5, p. 465 ("I'm very defensive"), and p. 526 ("I'm going to be the prime suspect"), and p. 527 (I've felt like I've been a suspect "[a]s soon as I left my house"), and p. 562 ("at this particular moment I feel I have to defend myself, and six hours ago I felt that I had to defend myself even before I told you guys what I was doing last night. I mean, I was defensive whenever -- when all the cops came to my house"). Defendant made other statements during his interview indicating he believed he could leave. See Vol. 5, 486 ("I told you I was going to go clean for a couple of days and sit down and think about everything and write down stuff on a piece of paper, and I wanted your card and I was going to call you"); pp. 508-09 ("I am just a little bit smarter than the average person. I would not divulge information, I would not sit here and [tell] the police. . . that I have my mom's ATM card, her gas card, If I did this. I have been on the streets long enough to know [to] keep my mouth closed, and I wouldn't go home. I mean you understand that"). An "interviewee's own set of apprehensions or mental state, unless visited upon. . . him by the interrogator, does not require suppression." *State v. Scott*, 786 So. 2d 606, 608 (Fla. 5 DCA 2001). Regardless of what Defendant's view was, the standard is an objective one. *See Stansbury*, 511 U. S. at 323.

> home either. Well, I mean if it comes down to it, but.[92]

See Schoenwetter, 931 So. 2d 867 (no custody where defendant not told he was under arrest, and when he was asked during interview if anyone told him he was under arrest, he responded, "No"). *See also Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (defendant in custody where detective said "You and I are going to talk. We're not going to leave here until we get to the bottom of this. . . .).

The Court also notes that by the time of this interview, Defendant knew that Erin had been interviewed twice, and was allowed to leave. During Defendant's 11:53 interview, the detectives accused Erin of changing her statements and lying.[93] Thus, although he knew the detectives had accused Erin of lying, Defendant likewise knew she was free to leave.

"Although it is certainly true that a suspect who has been advised that he is free to leave is less likely to be deemed to be in custody. . . the absence of such advice does not establish that the interrogation was custodial." *Pitts*, 936 So. 2d at 1125. *See Roman v. State*, 475 So. 2d 1228, 1231 (Fla. 1985) (same). Here, although the detectives never outright told Defendant he was free to leave, the circumstances certainly would have indicated to a reasonable person innocent of any crime that he was free to leave. Not only did Waldron tell Defendant that he

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[92] Vo. 5, p. 527.

[93] Vol. 5, p. 513. *See* Vol. 5, p. 489 (Erin's "changed her story up several times"), and p. 518 ("you can't remember what story you [and Erin] talked about telling the police").

needed to make arrangements to stay somewhere, he said to him "Where are you going to live now,""you don't have handcuffs on,""has anybody said you're under arrest," and "did you ask to leave."

e. After the interview

After this interview, Waldron and Defendant had another cigarette break outside.[94] During this time they stood outside the building, there was nothing stopping Defendant from leaving, and Defendant was not told whether he was or was not free to leave.[95] Defendant apologized to Waldron "[f]or some of the things that [he] said or the way [he] was acting," to which Waldron responded that it was no big deal.[96] The two also discussed the logistics of the arrangement Defendant said he had with his mother to borrow $1300 to buy drugs and set up a drug dealing business in Bradenton.[97] Upon finishing, they went back upstairs and began the fourth and final interview.[98]

4. January 8, 2004 between 1:22 a.m. and 2:36 a.m.

This interview occurred in the same conference room, with Defendant seated closest to the door.[99] Waldron began the interview by discussing the arrangement Defendant claimed to have had with his

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[94] Vol. 5, p. 532.

[95] Vol. 5, p. 532.

[96] Vol. 5, p. 534.

[97] Vol. 5, p. 535.

[98] Vo. 5, p. 533.

[99] Vol. 5, p. 548.

mother, and again addressing the inconsistencies between Defendant's statements and between what Defendant had said and what other witnesses had said)[100] Waldron showed Defendant pictures of his parents' bodies, repeated that they had a witness placing his car at the Ross home between 1 and 1:30 that morning and repeated other evidence such as the fact that there were no signs of a forced entry.[101] Det. Waldron also confronted him with information Mr. Young told them,[102] and the detectives took a DNA sample from Defendant.[103]

a. Manner in which Defendant was summoned to the interview

While Defendant had been at CID for about 11 hours, only about two and one-half of those hours were spent being questioned. During the intervals between Defendant's interviews, Defendant knew the detectives were interviewing other witnesses. *See Cotton v. State*, 901 So. 2d 241, 246 (Fla. 3rd DCA 2005) ("the fact that [the defendant] was with the police for approximately nine hours and never told he was free to leave did not elevate. . . consensual encounter into a formal arrest"; "[t]here were periods of delay between his interviews because the lead detective was simultaneously interviewing the other witnesses"). Further, Defendant was free to eat, use

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[100] Vol. 5, pp. 533-35. 540-44, 568-71.

[101] Vol. 5, pp. 535-38.

[102] Vol. 5, pp. 539-40.

[103] Vol. 5, p. 544. The detectives asked Defendant if he would provide a sample during the 11:53 interview, to which Defendant consented. *See* Vol. 5, pp. 484-85.

the restroom, and roam around. *See Perez v. State*, 919 So. 2d 347, 361 (Fla. 2005) (during 25-hour interview period, defendant given opportunities to nap, never expressed being tired to the point that he wanted to discontinue the interview process, was given the opportunity to take smoking and restroom breaks, and was given snacks and drinks when requested); *Slocum v. State*, 757 So. 2d 1246 (Fla. 4th DCA 2000) (defendant interviewed over a period of days for a total of 20 to 24 hours). Again, there is no indication that Defendant was coerced into submitting to this interview.

b. Purpose, place, and manner of questioning

During the majority of the interview, the detectives confronted Defendant about problems with his story, made it very clear that they did not believe him, and moved away from mere suggestion by telling him they believed he committed the murders:[104]

(1) Q: *What happened was* you were pissed off that your parents aren't going to give you any more money. You go over there in a fit of rage, and you brutally kill your parents, you take your mom's ATM card, and you go to the bank today and you try twice to use it. And then you even go inside the bank to try to get the PIN number for it, because your mom changed it two days ago when you originally asked her for the

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[104] Vol. 5, p. 537-84.

$1,300. And this is all after by your own admission yesterday, you had been out driving around doing Xandies, drinking, smoking bowls of marijuana, going to all these different places, washing your blood-stained clothes this morning -- or yesterday morning at Erin's house. . .[105]

(2) Q: I think you understand perfectly, okay?

A: Then just come out and say it then.

Q: We've been saying it, *I told you, you killed your parents.*[106]

Nevertheless, if someone else committed the crime, the detectives gave Defendant the opportunity to help them determine who that person might be:

(1) Q: What proof are we going to find that's going to show that you're innocent?[107]

(2) Q: Well, you haven't done much to cooperate with that investigation, or to take any suspicion away from yourself.[108] You've done everything there is to point the finger right at yourself)[109]

(3) Q: I would like to believe that you had nothing to do with this.

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[105] Vol. 5, p. 546 (emphasis added).

[106] Vol. 5, p. 559 (emphasis added).

[107] Vol. 5, p. 551.

[108] Vol. 5, p. 563.

[109] Vol. 5, p. 581.

The detectives did explain the difference between premeditated and "heat of the moment":

(1) Q: *** You lose your cool because you're upset, spur of the moment. That's a lot different than cold-blooded premeditated doing something.

A: Okay.

Q: If you got pissed off because they wouldn't loan you any money, you were mad, you were high, you weren't in control of your senses, then that changes things. People do some stupid stuff when they're intoxicated or high.

A: will agree with you on that statement.

Q: So it's pretty clear what happened, but it still doesn't explain why. And the why it happened can be the difference between the death penalty or some time in prison or some other type of thing. And that's what it comes down to now. We know what happened, what we're not clear about is why, and only you can tell us why.[110]

(2) Q: You can still love somebody and lose your cool and do something that you later regret.[111]

Despite all of this, there was a lack of compulsion by the detectives in obtaining or retaining Defendant's presence. *Cf Mansfield v. State*, 758 So. 2d 636 (Fla. 2000) (defendant in

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[110] Vol. 5, p. 549.

[111] Vol. 5, p. 552.

custody where, although detectives made it apparent to defendant that he was the prime suspect, they also told defendant "You and I are going to talk. *We're not going to leave here until we get to the bottom of this.* I'm going to help you. That's what I'm going to do. I'm going to help you. I'm going to help you remember and we're going to get this thing cleared."). *See Yarborough v. Alvarado*, 541 U.S. 652, 657 (2004) (no custody even in light of following conversation -- Q: "[Y]ou left out the shooting. A: The shooting? Q: Uh huh, the shooting. A: Well I had never seen no shooting. Q: Well I'm afraid you did. A: I had never seen no shooting. Q: Well I beg to differ with you. I've been told quite the opposite and we have witnesses that are saying quite the opposite *** So why don't you take a deep breath, like I told you before, the very best thing is to be honest *** Now all I'm simply doing is giving you the opportunity to tell the truth. . . ."); *Thompson v. Keohane*, 516 U.S. 99, 103 n. 1 (1995) (no custody where officer stated to defendant "we know the who, the where, the when, the how. The thing we don't know is the why. And that's. . . the thing we've got to kind of get straight here today between you and I. See I know that you did this thing. There's.. . no question in my mind about that. I can see it. I can see it when I'm looking at you"). In fact, Defendant said several times that he wanted to help the detectives, and expressed no desire to stop talking)[112]

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[112] Vol. 5, p. 551 ("I've tried to help you"; "I'm trying to help you. I want to know who did this, too"), and p. 563 ("I'm trying to help you guys out"), and p. 582 ("I just want to help out").

c. **Whether Defendant was confronted with evidence of his guilt**

Waldron told Defendant they had a witness who saw his car at the house between 1 and 1:30 in the morning,[113] told him that the scene looked like a staged burglary,[114] and showed him pictures of the crime scene.[115] Although Waldron also told him his parents were beaten to death,[116] the Court does not find that this was necessarily evidence of Defendant's guilt.

d. **Whether Defendant was informed he could leave**

There were statements indicating that Defendant could leave:

(1) Q: All night long you've been concerned about if you're going to be going to jail, you've asked me that a couple times, if you were going to go to jail. You were sitting in the room earlier --

A: Yeah, you put me in that room --

Q: If you did absolutely nothing wrong, why would you be concerned about going to jail?

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[113] Although, apparently, this was not true. *See Fitzpatrick v. State*, 900 So. 2d 495, 511 (Fla. 2005) ("this Court has held that police misrepresentations alone do not necessarily render a confession involuntary").

[114] Vol. 5, pp. 535-36, 545, 546.

[115] Vol. 5, p. 535. These were actually "two Polaroid pictures of [Defendant's] parents dead in the bed." *Id.* at 563.

[116] Vol. 5, p. 568.

A: Because I told you I'm a defensive person.

Q: No, no, I don't buy that, if you've done nothing wrong ··

A: I have done nothing wrong.

Q: Then why are you concerned about whether or not you're going to go to jail. ***[117]

(2) Q: Because right now I'll tell you this, your car has been impounded.

A: Okay.

Q: And a search warrant is going to be obtained to search your vehicle.

A: That's fine.

Q: Nobody's going inside the vehicle, and nobody will until we get a search warrant for that vehicle.

A: That's fine.

Q: Nobody's going inside that vehicle, and nobody will until we get a search warrant for that vehicle.

A: Okay, so that means I have to ··

Q: You're going to have to find another method of transportation there. There is a deputy guarding that house, no one is allowed into that house right now, other than law enforcement officers.

A: That's fine, I'm not going to go anywhere near it.[118]

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[117] Vol. 5, pp. 561-62.

(3) Q: So where are you going from here?

A: What do you mean. Oh, where am I going?

Q: Where are you going to be?

A: I'm staying in town. If you guys let me back in my house --

Q: No.

A: Like what, like another week?

Q: Not tonight.

A: I know not tonight.

Q: Maybe about a week.

A: I'll be at Erin's house. I'm not going to skip town.[118]

(4) A: Well, then I -- right now I'm on my own, I know that. My sister's in Gainesville, I know that I -- that I probably can't leave town. Am I right? Right?

Q: We would ask that you not.

A: I'm not going to. But I mean right now -- right now -- I mean if I can't stay with Erin, you know, I'll call my Grandma, or I'll talk to Mikey.

Q: Okay. Well, before you leave today, we'd like to know where you're going to be at.

A: I -- I - I don't know. I haven't called anybody. I'll try to give you an answer before I leave, but -- um, I would

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[118] Vol. 5, pp. 580-81

[119] Vol. 5, pp. 582-83

> personally like to take some time by myself, and it's something -- you guys don't have to worry about me from here, I'll make it back into Bradenton. But I need time to think. And you guys have your things to do.[120]

In addition to these comments by the detectives, Defendant knew Erin was free to go home despite the detectives accusing her of lying,[121] at the end of this interview he was free to leave the station,[122] and he called Waldron shortly after Waldron dropped him off at the Dodds's home.[123] A reasonable person in these circumstances would not have felt as though his freedom had been curtailed to the point of actual arrest.

e. After the interview

At the end of this interview, Defendant called Teri Dodds, who gave him permission to spend the night in her home.[124] Waldron drove Defendant to the Dodds home.[125] In the car on the way, Defendant asked Waldron "a little bit about what might happen the next day, urged [him] to make sure to check the

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[120] Vol. 5, p. 584.

[121] Vol. 5, p. 549; Vol. 5, p. 556 ("Erin sat here and lied to me").

[122] *See State v. Shell*, 932 So. 2d 628, 634 (Fla. 2d DCA 2006) (noting that although the defendant was not told she was free to leave, she "was free to leave with her sister after the interview").

[123] Vol. 5, pp. 586-90.

[124] Vol. 5, p. 585.

[125] Vol. 5, pp. 585-86.

phone records, [and] find the contract in the house" because it would prove his innocence.[126]

5. January 9, 2004

Waldron had no further contact with Defendant on January 8th but did receive four voice mail messages from him:[127]

> Hi Bill, this is Blaine. You just dropped me off, just a few minutes ago. I checked the caller ID on when Mikey's father called here to let us know that his door was unlocked and that -- and I was guaranteed -- I was right, it was at 3:25 a.m. in the morning, and that -- that everybody else was wrong about the time. We have it on the caller ID, and I know that doesn't say anything about who's actually on the phone, but that's whenever I did drive Mikey home, was at 3:30 in the morning, like I said. You can call me back at ***, that's Erin's telephone number, or I'm going to call you tomorrow around 10:00 in the morning -- or I'll call you later, because I know you got that meeting at 9. Bye bye.
>
> Hey, it's Blaine again. It's 3:30 in the morning, and I realized that I do not have my bag, and that it was in my car, so we did pack everything up, and we were leaving after we left my parents' house. I guess Erin put the stuff in my car without me noticing. I'll call you back if I think of anything else. Bye bye.

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[126] Vol. 5, p. 586.

[127] *See* Vol. 5, pp. 586-90. The cassette recording and transcript of the messages were entered as State's Exhibits I and IA.

> Hi, Detective Bill, this is Blaine. I just got off the phone with my sister, she's in town, and I'm going to my Grandma's house. The number there is ***. And my family's coming down, just to let you know. I'll talk to you later, I'll give you a call -- (unintelligible) -- bye bye.
>
> Hello Detective Waldron, this is Blaine Ross. I'm calling in regards to what's going on. I have some questions, um, regarding the case, and then some things that have been brought up to me in the recent time. Please give me a call back at ***. That's my Grandma's house, that's where I'm staying. Please call me. Thank you. Bye bye.[128]

Waldron did not return any of the first three calls, and did not meet with Defendant again until the afternoon of January 9th,[129] when he learned that Defendant and his sister were going to be at CID to meet with the victim's advocate.[130]

After Defendant met with the victim's advocate, Waldron met with him in an interview room containing an unconcealed video camera mounted to the ceiling area, which recorded the interview.[131] The room was smaller than the room used in the previous interviews, and Defendant sat in a chair in a corner located opposite the door with

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[128] Vol. 5, pp. 588-89; State's Exhibits I and IA.

[129] Vol. 5, pp. 590-91; Vol. 6, p. 611, 624.

[130] *See* Vol. 1, p. 17.

[131] Vol. 5, p. 592. The videotape and transcript of the interview were entered as State's Exhibits 10A, B, C, and D. *See* Vol. 5, pp. 597-99.

Waldron seated between him and the door. Before the interview got underway, Waldron told Defendant that if there was anything he needed "just let [him] know."[132]

Defendant argues not only that he should have been advised of his *Miranda* rights earlier in the interview, but that once he was advised of those rights, his subsequent confession was "tainted." He also argues that the detectives coerced his confession.

a. **Was Defendant in custody for purposes of *Miranda***

As an initial matter, Defendant argues that "because [he] was subjected to custodial interrogation on January 7th and 8th, absent being informed of *Miranda* rights," "[t]he entire custodial interrogation . . . on January 9th was unlawful."[133] The Court has already found that Defendant was not in custody on the 7th and 8th".

Defendant also argues that the detectives' conduct "went well beyond any of the detectives' actions in *Ramirez [v. State*, 739 So. 2d 568 (Fla. 1999)[134] or *Mansfield [v. State*, 758 So. 2d 636 (Fla.

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[132] Vol. 6, p. 624.

[133] Def.'s Br., at 48.

[134] In *Ramirez*, by the time the defendant, a juvenile, was read his rights, (1) police had a statement from a suspect implicating the defendant, (2) the suspect phoned the defendant from the station, while detectives listened in, and discussed items of physical evidence that were in the defendant's possession and made plans to destroy the victim's automobile to eliminate evidence of the crime, and (3) the defendant produced the evidence in his possession when a deputy arrived at his home and asked for it, (4) the defendant accompanied the deputy to

2000)],"[135] in which "the Florida Supreme Court found the subjects were in custody and should have been advised of their *Miranda* rights."[136]

i. How was Defendant summoned to interview

The evidence demonstrates that Defendant was not "summoned" at all. As noted, Defendant left several messages for Waldron indicating he wanted to talk to him about additional information that he had learned.[137] On January 9th, Waldron tried "calling him back a couple of times at his

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retrieve other items, (5) the defendant went to the station to be interviewed, and (6) the detectives told the defendant that they knew he was involved. The detectives "undoubtedly had probable cause to arrest him." *Ramirez*, 739 So. 2d at 574. The court noted that Ramirez was a juvenile, and held that "a reasonable adult in Ramirez's position, would have believed that he was in custody at the time of the interrogation at the police station: he was questioned in a small room in the police station by two detectives, he was never told he was free to leave, and all of the questions indicated that the detectives considered him a suspect." *Id.* "Therefore, the *Miranda* warnings should have been administered prior to any questioning." *Id.* (emphasis added).

[135] In *Mansfield*, the court held that the defendant was in custody where he "was interrogated by three detectives at the police station, he was never told he was free to leave, he was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect." *Mansfield*, 758 So. 2d at 644. In addition, "one of the detectives made it clear that Mansfield was not free to leave: 'You and I are going to talk. We're not going to leave here until we get to the bottom of this." *Id.*

[136] Def.'s Br., at 43.

[137] Vol. 5, p. 586-590.

grandmother's house" and couldn't get through.[138] He learned from the victim's advocate supervisor that Defendant and his sister were going to meet the victim's advocate, which was located in the same building as CID.[139] He asked the victim's advocate to let him know when they arrived.[140]

Defendant was driven to the office by his sister. When they arrived, Waldron met them, took them to the victim's advocate office, and told Defendant that

> when he was finished up that [he'd] like to talk to him, that [he] had gotten his messages, that he had some additional questions, that he had some information he wanted to discuss, and that once he finished [Waldron] would be more than happy to meet with him and talk to him again.[141]

After Defendant met with the victim's advocate, he met with Waldron.[142] Defendant made it very clear that he wanted to be there to "give [the detectives] everything that [he] possibly can."[143] The Court finds that Defendant initiated this contact with Waldron, and, knowing they "were going to question [him],[144] voluntarily submitted to the interview. There is no

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[138] Vol. 5, p. 591.

[139] Vol. 5, p. 591.

[140] Vol. 5, p. 591.

[141] Vol. 5, pp. 591-92.

[142] Vol. 5, p. 592.

[143] Vol. 6, p. 624.

[144] Vol. 6, p. 656.

doubt that Defendant knew that he would be questioned at least as intensely as he had been questioned during the previous interviews.

ii. Purpose, place, and manner of questioning

Defendant was interviewed by Waldron and another detective that came in and out.[145] Waldron told him that he was not "charging [him] with anything,[146] and that if "[he] want[ed] to go downstairs and have a cigarette, [he] need[ed] to use the bathroom, [or] get something to drink" to let him know.[147] The interview began with a lengthy discussion of the media's coverage of the homicides, and how the investigation was progressing.[148] The interview progressed cordially, with Waldron responding to Defendant with short answers and follow-up questions.[149]

The purpose of the interview was to determine what Defendant had done in the 24-hour period before discovering his parents, a fact Defendant knew when he went into the interview. In one of his earlier interviews, Defendant stated that he wanted to sober up and try to think of his activities in the 24 hours

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[145] Vol. 6, p. 625.

[146] Vol. 6, p. 604. It could be argued that this statement was made in reference solely to any charges pertaining to Defendant's relationship with Erin. Nevertheless, as part of the totality of the circumstances, this would contribute to whether a reasonable person would believe he was in custody.

[147] Vol. 6, p. 624.

[148] Vol. 6, pp. 604-24.

[149] Vol. 6, pp. 625-42.

before discovering his parents, and his subsequent voice messages suggested he had more information to provide to Waldron. He also indicated to Waldron that he "ha[d] no problems coming down here talking to [him], trying to give [him] everything that [he] possibly can."[150] Thus, when Waldron started re-questioning Defendant about what he had been doing before finding his parents, it was in accordance with what Defendant had been offering to him for two days. Indeed, Waldron specifically referred to this when he started asking questions.[151]

After a cigarette break outside, the two began discussing Defendant's family dynamics, his parents' relationship and impending divorce, and the $107,000 bank account.[152] Waldron accused him of lying during previous interviews, confronted him on inconsistencies in his statements, asked him to tell the truth, and asked him how his lying would make his family feel.[153] Defendant, however, admitted to lying to the detectives in previous interviews.[154] The detectives also made it clear to Defendant that they believed he committed the offenses, but made no threats or promises to him. Although there are portions of the interview that are confrontational and indeed pointed and accusatory,[155] most of the

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[150] Vol. 6, p. 624.

[151] Vol. 6, p. 625 ("you've had a little bit of time to think about things").

[152] Vol. 6, pp. 642-48; Vol. 7, pp. 679-81.

[153] Vol. 6, pp. 648-64; Vol. 7, pp. 670-79, 686, 693, 702.

[154] *See, e.g.*, Vol. 6, p. 660.

[155] *See, e.g.*, Vol. 6, p. 652 ("It does not look good at all"); Vol. 6, p. 662 ("Everything keeps coming back to you, Blaine"); Vol. 7,

interview was overtly non-confrontational and overtly conversational.[156]

Oregon v. Mathiason, 429 U.S. 492 (1977) and *California v. Beheler*, 463 U.S. 1121 (1983) teach us that some degree of coercion is indeed part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart. Whatever coercion existed in this case was not the sort that a reasonable person would perceive as restricting his freedom to depart. Indeed, the facts support the opposite conclusion. Again, prior to being read his *Miranda* rights, Defendant was never physically restrained or placed in handcuffs.

Knowing that he had been intensely questioned in previous interviews, and in fact had been accused of killing his parents, and then was free to leave, and was, in fact, driven "home" by Waldron, Defendant went to speak to Waldron, again "kn[owing] that [they] were going to question [him]."[157] There is no doubt in this Court's mind that

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p. 682 ("Blaine, I don't believe [that you didn't kill your parents]"); Vol. 7, p. 687 ("I know how the blood got there[, by beating and strangling your parents to death]"); Vol. 7, p. 727 ("Blaine, you were there").

[156] *See. e.g.*, Vol. 6, p. 612 (we have to check your car for evidence "even though you just drove it up there and stuff"); vol. 6, p. 613 (in discussing examining shoes for evidence "[p]robably nothing to do with it, but we've got to cover all the bases on that"); Vol. 6, p. 648 ("[We're doing an investigation] to try to identify the person or persons responsible for this")

[157] Vol. 6, pp. 655-56.

Defendant knew he would face similar questions from the detectives, but voluntarily went to the station and spoke with the detectives anyway. Defendant also knew that his sister was waiting for him, and when he asked to speak with her, Waldron brought her in to see him. Waldron also responded to all Defendant's other needs, i.e., restroom breaks and refreshments.[158]

Defendant asked Waldron twice about his status. First, Defendant asked

> A: Am I being charged, today? Am I going to be arrested. . . ?
>
> Q: What do you think should happen?
>
> A: I don't know. I don't feel that I should be arrested. . . .[159]

Waldron specifically testified that he did not intend to arrest Defendant at that point. Second, right before Waldron read Defendant his rights, Defendant again asked if he was being arrested, to which Waldron said "Nope. At this time you and I are talking, okay," and then "[y]ou're not in handcuffs or anything like that, okay?[160]

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[158] *See* Vol. 7, p. 706 (offered a "glass of water or anything"; Defendant said no); Vol. 7, p. 723 (offered "glass of water, or use the bathroom or anything"; Defendant shook his head, and then asked if he could "bum another cigarette"); Vol. 7, p. 740 (offered "bathroom or anything" break; Defendant said no); Vol. 7, p. 743 (offered "anything else" and "another cigarette"; Defendant took cigarette); Vol. 7. p. 747 (Waldron testified he got Defendant a soda after Defendant spoke to his sister).

[159] Vol. 7, p. 736.

[160] Vol. 7, p. 742.

The Court notes that the detectives did, indeed, accuse Defendant of killing his parents a number of times during this interview and that, at times, voices are raised. As indicated previously, however, the majority of the conversation was cordial and particularly non-accusatory. In fact, the majority of the interview was similar to that which had taken place two days earlier, from which Defendant had left after the interview was completed. There is nothing in this interview that overtly suggested that anything dissimilar was going to happen after this one was completed.

iii. **Whether Defendant was confronted with evidence of his guilt**

The detectives did confront Defendant with evidence of his guilt during this interview. They told him not only evidence they had told him during earlier interviews,[161] but added that blood had been found on his pants that matched the crime scene[162] After Defendant had been read his *Miranda* rights, Waldron told him they found a ski mask in his car that tested positive for blood. This fact alone, however, does not turn an otherwise non-custodial interview into a custodial one.

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[161] Vol. 7, pp. 672-73 (parents killed by somebody known to them; not a random burglary, no evidence of anybody breaking in).

[162] Vol. 7. pp. 682, 686, 689, 700.

iv. Whether Defendant was informed he could leave

As indicated previously, Defendant appeared at CID voluntarily and this Court will find that he remained there voluntarily. The Court has reviewed this interview several times and finds that although at times the tone is more pointed and direct than the previous interviews, based upon the totality of the circumstances here Defendant was not in custody.

Defendant argues that the "custodial" interrogation that preceded the giving of the warnings tainted his subsequent waiver. *See Missouri v. Seibert*, 542 U.S. 600 (2004). "In *Seibert* . . . the Court addressed 'a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession.' " *Pitts*, 936 So. 2d at 1135. "*Seibert* was decided against the backdrop of *Oregon v. Elstad*, 470 U.S. 298 . . . (1985), which considered 'whether an initial failure of law enforcement officers to administer the warnings required by [*Miranda*], without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his Miranda rights.' " *Id.*, quoting *Elstad*, 470 U.S. at 300. "*Elstad*, 470 U.S. at 318, held 'that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.' " *Id.*

Although the *Seibert* plurality focused on five factors, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court

may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Pitts*, 936 So. 2d at 1136. Thus, "the holding of *Seibert* should be viewed as the position taken by Justice Kennedy," *id.*:

> [t]he admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. *If the deliberate two-step strategy has been used*, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the Miranda warning and of the Miranda waiver.

Seibert, 542 U.S. at 622 (emphasis added). The "deliberate two-step strategy" to which Justice Kennedy referred is called the "question first" method, by which the questioner interrogates in successive unwarned and warned phases. Under this method, officers in a calculated manner first obtained unwarned incriminating statements from a suspect, and then used those incriminating statements in the warned interrogation in order to undermine the midstream *Miranda* warnings. *See id.* at 609-10. *See also United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1136 (11th Cir. 2006). "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect *has already confessed*." *Id.* at 611. Thus, "*Seibert* requires the suppression of a

post-warning statement only where a deliberate two-step strategy is used and no curative measures are taken; where that strategy is not used, the admissibility of postwarning statements continue to be governed by the principles of *Elstad*," where the Court allowed a post-warning confession even where the police had previously obtained a pre-warning confession, so long as the pre-warning confession was voluntary. *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006) (emphasis added).

As noted by the 11th Circuit in *Gonzalez-Lauzan*, both the *Elstad* and *Seibert* decisions "provide important guidance." The question is whether Defendant voluntarily waived his rights.

> In answering that question, Elstad relied on a presumption that a defendant's waiver is voluntary in the absence of circumstances showing otherwise. In contrast, the *Seibert* plurality looked more to whether the *Miranda* warnings given to a reasonable person in the suspect's shoes could function effectively as *Miranda* requires, and required a multifactor test to determine their effectiveness. The fifth vote in *Seibert* more narrowly concluded that midstream *Miranda* warnings did not function effectively when the officers in a calculated way first obtained warned statements, and then used them in the warned segment to undermine the midstream warnings.

Gonzalez-Lauzan, 437 F.3d at 1137 (citations omitted). "*Miranda* warnings are customarily given under circumstances allowing for real choice between talking and remaining silent." *Seibert*, 542 U.S. at

609. The question is did "the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" *Id.*

In this case, based on the totality of the interview, this Court finds that Defendant was not in custody prior to being given his *Miranda* warnings, and therefore finds that *Seibert* does not apply. Even if it did apply, however, this case does not meet the standard.

First, Defendant did not confess prior to being read his *Miranda* rights, and thus this case does not follow the *Seibert* sequence of interrogating a suspect while in custody, eliciting a confession, informing the suspect of his *Miranda* rights, and then eliciting the same confession. *Seibert*, 542 U.S. at 615-617. The furthest Defendant went pre-*Miranda* was "I don't remember doing this," "from what you've told me you make me feel that I did do this. And I'm scared, because I don't remember. . . I don't know if I did," "I can't tell you if I did it or not, because I don't know," and "I can tell you that I didn't plan to kill my parents. . . I could have done this, and I could have been so angry to have done this. But. . . I can't put myself there. I don't remember if I was there, so I can't tell you if I did or not."[163]

Second, there is no evidence that the detectives deliberately withheld *Miranda* until Defendant confessed. Waldron was asked about when he was taught to provide *Miranda* warnings, to which

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[163] Vol. 7, pp. 729-37.

he responded "[a]t a point in time where a person's not going to be free, their movements are restricted and they're not just free to get up and walk out."[164] The evidence indicates that Waldron read *Miranda* after he learned of the ski mask that contained blood that had been retrieved from Defendant's car. Indeed, Waldron specifically stated immediately before advising Defendant that "[t]here's a couple of things that I discovered, and before we go any further I want to cover this with you. . . ."[165] Once Defendant waived his rights, Waldron immediately brought up the ski mask.

d. Post-*Miranda* issues

Defendant received his *Miranda* warnings at approximately 7:23 p.m.[166]

> Q: There's a couple of things that I need to go over with you real quick. There's a couple of things that I discovered, and before we go any further I want to cover this with you, it's just a matter of procedure, um, based on everything we're talking about.
>
> A: So am I being arrested?
>
> Q: Nope. At this time you and I are talking, okay? And I would like to talk to you some more. But before I do that, I need to go over this.
>
> A: Okay.

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[164] Vo. 9, p. 83.

[165] Vol. 7, p. 742.

[166] *See* State's Exhibit 12, "Warning of Constitutional Rights" signed by Defendant.

Q: You're not in handcuffs or anything like that, okay? Do you need anything else?

A: (Shook head)

Q: Do you want another cigarette?

A: (Nodded head)

Q: I got to read this to you, Blaine: You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to talk to an attorney and have him or her present with you while you are being questioned. If you cannot afford to hire an attorney, one may[167] be appointed to represent you before

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[167] Defendant argues that Det. Waldron's use of the phrase "may be appointed" prevented him from voluntarily waiving his rights. *See* Def.'s Br., at pp. 28, 54. The Court disagrees. '[W]arnings failing to advise a defendant of the right to counsel 'during' questioning are constitutionally defective." *Martin v. State*, 921 So. 2d 697, 699 (Fla. 4th DCA 2006). Indeed, "the police must somehow communicate to the accused the basic idea of the right to consult a free attorney before being questioned." *Thompson v. State*, 595 So. 2d 16, 17 (Fla. 1992). Nevertheless, "*Miranda* warnings are not meant to be a formalistic recital from a card containing verbatim language extracted from the *Miranda* decision." *Maxwell v. State*, 917 So. 2d 404, 408 (Fla. 5th DCA 2006). "Although [the Court should] not indulge in semantical debates between the state and a defendant over the particular words used to advise the defendant of his or her rights, [the Court must] require that the *Miranda* warnings or their equivalent be provided with *sufficient clarity so that a defendant has a reasonable opportunity to understand the rights inherent in the warnings and voluntarily act upon them*." *Id.* (emphasis added). The rights provided to Defendant met that requirement -- the totality of the warning was sufficient to convey that if Defendant wanted an attorney and could not afford one, he could ask for a free attorney.

any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I've explained to you?

A: Yes.

Q: Okay. If you would, write your answer here.

A: (Complied)

Q: Having these rights in mind do you wish to talk to us now?

A: I don't -- I can't tell you anything different.

Q: And that's up to you.

Q: I can't make your decision for you.

A: I want -- I'd really like to talk to my sister, and since she's not here --

Q: We tried to get in touch with her to get her back here.

A: I don't know what I'm going to do. I don't know what's going to happen, and --

Q: Well, I'm willing to talk to you if you want. We're trying to get in touch with your sister now so -- you're indicating that you do want to talk to me; correct?

A: Yes.

Q: Okay, if you would, please sign right there.

A: (Complied)

Q: Okay, let the record reflect that Blaine Ross has been read his rights and understands

> them and agrees to talk to me at this time.[168]

Defendant argues that by referring to *Miranda* as "just a matter of procedure" and telling him that he was not under arrest, "the detectives . . . misled [him] regarding *Miranda* rights." Whether Defendant's rights were validly waived must be ascertained from two separate inquiries:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999), citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The 'totality of the circumstances' to be considered in determining whether a waiver of *Miranda* warnings is valid may include the manner in which the *Miranda* rights were administered, including any cajoling or trickery. *Ramirez*, 739 So. 2d at 575-76 (held that detectives used trickery where they

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[168] Vol. 7, pp. 742-44. Waldron testified that Defendant did not appear to be under the influence of drugs or to be suffering from any mental infirmity at the time he signed the waiver. *See* Vol. 7, p. 746.

suggested in casual, offhand manner that they did not expect defendant, a juvenile, to invoke his rights). "[T]he question of whether the suspect has validly waived his rights 'is not one of form," and thus "[a]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege." *Id.* This Court does not find that, taken in context, Waldron's saying "it's just a matter of procedure" amounted to threatening, tricking, or cajoling Defendant into waiving his rights. Waldron also said "I need to go over this" and "I got to read this."

As to Defendant's claim that he was misled when the detectives told him he was under arrest,[169] the Court does not agree. It is unclear as to exactly when Waldron purportedly "indicated to [Defendant] that [he] would be arrested," as claimed by Defendant. Assuming Defendant is referring to page 756 where Waldron says "I think it would be right," it seems to the Court that Waldron is referring to Defendant's statement that he had "a feeling . . . that [he was] going to tell [his] family about this . . . ."[170] In the same discussion Waldron states that he "ha[s] to tell them what happened."

Defendant claims that he invoked his right to remain silent several times during this interview before he was read his *Miranda* rights. The Court finds that Defendant did not invoke any of his rights before he was read his *Miranda* rights, during which time Defendant stated only the following:

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[169] Def.'s Br., at 53.

[170] Vol. 7, p. 754.

> A: I tried to tell you everything I possibly could. I've tried to be honest with you. I didn't kill my parents, I didn't -- I wasn't there -- I don't know -- I don't know what else to say.[171]

This does not constitute an unequivocal assertion of his right to remain silent, as this statement could reasonably have meant that he was willing to talk, but did not know what else he could say that was any different from what he had said before.

The Court does not agree with Defendant that he invoked his rights after Waldron read them to him. "Once warnings have been given, . . . [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. Police, however, are under no obligation to clarify an ambiguous or equivocal assertion. "A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *State v. Owen*, 696 So. 2d 715, 718 (Fla. 1997). *See Davis v. United States*, 512 U.S. 452 (1994). "If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation." *Id.* (defendant's statements "I'd rather not talk about it" and "I don't want to talk about it" were equivocal). After he was advised of his rights, Defendant stated "I don't -- I can't tell you anything different," and "I don't *think* I can help you anymore.

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[171] Vol. 7, p. 692.

I don't *think* I have anything else to say."[172] Neither of these, however, was an unambiguous assertion of his right to remain silent. *See, e.g., Kyser v. State*, 522 So. 2d 285, 286 (Fla. 1988) (noting that "I *think* I might need an attorney" and "I *think* I want to talk to a lawyer before I talk about that" were equivocal requests). Taken in context, it is clear that Defendant's comments meant that he was willing to talk to the detectives, but that he could not offer any different information. *See Rodriguez v. State*, 559 So. 2d 392, 393 (Fla. 3 DCA 1990) ("Yes, but I really don't have anything else to say" not an invocation of right to remain silent). Under *Owen*, the detectives had no obligation to clarify Defendant's statements, and could continue talking to him.

After being advised of his rights, but before signing his waiver of rights, Defendant also said "I want -- I'd really like to talk to my sister, and since she's not here - -," and "I don't know what I'm going to do. I don't know what's going to happen." Waldron responded by telling Defendant that they were trying to get in touch with his sister, and that he was willing to talk to Defendant. The Court finds that Defendant's comments were not unequivocal statements that he was invoking his right to remain silent, or his right to counsel. *Cf B.P. v. State*, 815 So. 2d 728, 729 (Fla. 5th DCA 2002) (*Miranda* violated where, after defendant was advised of rights and asserted right not to talk to officers until his father arrived, officer responded "If you want to wait for your dad, we can wait for your dad. *** If you want to wait for your dad, you can wait for your dad," "[b]ut

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[172] Vol. 7, pp. 744, 753-54.

we're talking about sex here. Okay," to which defendant responded "I'll talk to you"; "officer's comments. . . were intended to and did convince appellant to change his mind and talk to them immediately"). The Court finds that Defendant specifically indicated that he wanted to continue to speak with the detectives after being read *Miranda*.

The Court does agree with Defendant, however, that when he said "I really don't want to talk anymore,[173] he unequivocally asserted his right to remain silent. The Court therefore grants Defendant's motion as to the portion of the January 9th interview that occurred after he made that unequivocal assertion. This statement is markedly dissimilar to any previous statements, and is clearly an invocation of his right to cease the interview. The Court therefore suppresses the portion of the January 9th interview that is represented by page 787, line 6 to page 788, line 13 of Vol. 7 of the evidentiary hearing transcript.

c. Coerced Confession Issues

Defendant argues that his confession was involuntary and coerced by law enforcement, and in support thereof states (1) the detectives knew Defendant had ingested drugs "that had a negative effect on his memory"; (2) he told the detectives that he was confused about several aspects of the time preceding the discovery of the bodies; (3) the detectives confronted him with false evidence -- blood that matched the crime scene on his pants, Erin seeing him wearing those pants on the day of the

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[173] Vol. 7, p. 787.

homicides, and they had a witness swearing they saw his car at the Ross home; (4) the detectives intimidated him, both physically and psychologically; (5) the detectives "skillfully exploited [Defendant's] vulnerabilities and . . . insecurities," including his feelings about his father, his concern for Erin, and his perceived shortcomings about not being an independent adult. Defendant's expert, Dr. DeClue, testified at length as to this issue.[174]

Defendant relies on *State v. Sawyer*, 561 So. 2d 278 (Fla. 2d DCA 1990), in which the Second DCA found the defendant's confession to be involuntary where it was the product of enforced sleeplessness resulting from a 16-hour serial interrogation during which the defendant had no meaningful breaks, police asked him misleading questions, denied his requests to rest, refused to honor his *Miranda* rights and used the defendant's history of blackouts to undermine his reliance on his own memory. *See Brewer v. State*, 386 So. 2d 232 (Fla. 1980) (finding confession to be involuntary where police threatened the defendant with the electric chair, implying that they had power to reduce the charge against him and that his confession would lead to lesser charge).

The Court does not find that the circumstances of this interview rise to the level as the interview in *Sawyer*. Not only did law enforcement tell Defendant to tell the truth, but his sister did too. In fact, during their 12-minute meeting, Defendant's sister specifically told him "If you did it, then say you did it. But if you didn't do it, do not let them talk you into it.

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[174] *See* Vol. 8, pp. 852-969.

. . ."[175] There is nothing in the interviews that indicate that Defendant was coerced or intimidated into confessing to this crime. The Court has discussed at great length the salient features of the interviews and finds that the interviews, when taken as a whole, do not suggest that law enforcement engaged in coercion or intimidation.

E. Discussion regarding January 12th Interview

As noted, Defendant was arrested at the end of the January 9th interview, had first appearance on January 10th, was appointed an attorney, and invoked his constitutional rights on January 12th.[176] Subsequently, Defendant had his sister call Waldron because he wanted Waldron to "come up to the jail and see him."[177] Waldron went the Manatee County Jail on the afternoon of January 12th, and brought a tape recorder with him.[178] Prior to speaking with Defendant, Waldron did not check to see if he had been appointed an attorney, but assumed he had been appointed an attorney at first appearance.[179]

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[175] Vol. 7, p. 722.

[176] Defendant signed an "Invocation of Constitutional Rights" form at 10:16 on the morning of January 12th, although it wasn't actually filed in the clerk's office until January 13th.

[177] Vol. 7, pp. 791-92. In her phone message, Defendant's sister stated, in pertinent part:

> Hi Detective, Detective Waldron; this is Kimberly Sanford, ah, I went to Blaine's visitation today. Ah, he wanted me to have you please ah, call him, talk to him, come see him, he has something he wants to talk to you about.

State's Exhibit 1, p. 2.

[178] Vol. 7, p. 792.

[179] Vo. 10, pp. 8-9.

When Waldron arrived at the jail, he had a short conversation with Defendant *before* he advised him of his *Miranda* rights:

Q: -- (unintelligible) -- and I wanted to talk to you about that also -- (unintelligible) --

A: (Unintelligible) drug dealers, you know what I'm saying? Um, like maybe if I could -- I can't give you like addresses and everything like that, but if you were going to pull me out one day and if we could go for a little ride, I can show you at least five or six -- (unintelligible) --

Q: -- (unintelligible) -- all I can do is get some information from you to the State Attorney's office and see if the State Attorney's office would be -- (unintelligible)

A: I definitely want to make a deal before I say anything.

Q: Right, I understand that. Crazy people in here, huh?

A: Yep, some characters.

Q: This is where they put all the high-risk people and all the bad guys and stuff like that, is back here.

A: Yeah.

Q: -- (unintelligible) -- anybody but -- (unintelligible) -- pretty decent people. As far as the deputies -- (unintelligible) -- let somebody know, you know, -- (unintelligible) -- probably get you -- (unintelligible) -- We looked around the past few days in the river, and we're not finding anything.

A: Probably -- (unintelligible) -- I'm pretty sure that's where I threw the bat -- (unintelligible) -- other stuff probably floated away.

Q: Your mom's purse was a pretty good-size purse -- (unintelligible) --

A: -- (unintelligible) --

Q: Pretty sure you threw that off there too?

A: Uh-huh.

Q: We didn't come up with anything. They had -- (unintelligible) -- Hillsborough County Sheriff's Office, Tampa Police Department, Sarasota County Sheriff's Office -- (unintelligible) -- looked in the river, around that bridge, a couple hundred yards each direction, and -- (unintelligible) -- nothing, you know -- the purse had some straps on it, it should have hung up on something. They found cell phones that could have been tossed in there from a long time ago, even some credit cards and stuff. Nothing from your parents' house.

A: Um, that's where I threw it.

Q: Okay. You don't think you would have thrown it anywhere else or anything like that? Okay, the reason why I ask -- (unintelligible) --

A: I understand that.

Q: So your sister can have those. -- (unintelligible) --

A: -- (unintelligible) --

Q: -- (unintelligible) -- in the water yesterday -- (unintelligible) -- in the water Monday,

and nothing, so we pretty much called it off. That baseball bat -- aluminum baseball bat, it's going to float, and -- (unintelligible) --

A: Yeah.

Q: We got a couple phone calls from people coming in who think they've seen it, and we checked those areas and -- (unintelligible) --

A: You think the baseball bat floats?

Q: They bobble.

A: Yeah.[180]

Q: -- (unintelligible) -- Today's date is Monday, January the 12th, 2004. The time is 3:05 p.m. This interview is regarding Sheriff's Office Case Number 04-1021. The interview of Blaine Ross by Detective Bill Waldron at the Manatee County jail.

Now, Blaine, you had gotten a message to your sister to have me come up here and see you; correct?

A: Right.

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[180] Up to this point, Waldron's tape recorder had been in his pants pocket. Vol. 7, p. 792. There is no evidence that Defendant knew it was there, or that it was recording their conversation. Defendant, however, had no reasonable expectation of privacy in the jail. *See Hudson v. Palmer*, 468 U.S. 517 (1984) (prisoner had no reasonable expectation of privacy in his prison cell); *Allen v. State*, 636 So. 2d 494, 496 (Fla. 1994) (jailhouse conversations between inmates are not entitled to the same degree of privacy afforded some other communications); *State v. Smith*, 641 So. 2d 849, 851-52 (Fla. 1994) (a person has no reasonable expectation of privacy in a conversation in a police car); *Bedoya v. State*, 779 So. 2d 574, 579 (Fla. 5th DCA 2001) (a defendant does not have a reasonable expectation of privacy in a police interview room); *Cleveland v. State*, 557 So. 2d 959 (Fla. 4th DCA 1990) (no reasonable expectation of privacy in jail cell).

Q: So is that your request that I'm up here?

A: Yes.

Q: Okay. I just want to go over the warning of your rights again, just so you understand. And what I understand you're wanting to tell me is you have some possible information that you want to give to the State Attorney's office in consideration for these charges; correct?

A: Yes.[181]

Waldron then read Defendant his *Miranda* rights:

Q: Okay. You have the right to remain silent. Anything you say may be used against you in a court of law. You have the right to talk to an attorney and have him or her present with you while you are being questioned. If you cannot afford to hire an attorney, one may be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I've explained to you?

A: Yes.

Q: Okay, having these rights in mind do you wish to talk to me now?

A: I'll talk to you, but I'm not going to give you like information.

Q: No, I understand. ***[182]

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[181] Vol. 7, pp. 793-804. *See* State's Exhibits 13, 13A, and 13B.

[182] Vol. 7, 798-99. *After* Waldron read Defendant his rights, the following discussion occurred:

Q: *** Tell me exactly what it is that you would be -- that you would like to do in exchange for these two murder charges?

A: Well, I feel that I shouldn't go unpunished, like I shouldn't just be let go or anything like that, and I'll serve time, but I thought maybe a reduction in sentence, not as much time maybe -- not with as much crazy people, maybe down to like G1--west or something, not just sit in a cell with a whole bunch of crazy people. But I mean I'll give them a couple good names, I mean like high-up people, for a reduction in sentence. And maybe working down like G1-west or something like that. I'm not going -- I mean, I'm not going to run or anything like that, I'm going to serve my sentence, but, you know, I'd like to go outside and work. I'd like to work -- actually I would like to work at the motor pool, like where the cop cars -- work on -- I went to automotive school, and I'd like to work on cop cars.

Q: Okay. And the information, from what I understand, from what I take it, you're wanting to give out this -- what, various drug dealers?

A: Various drug dealers, throughout the town of Bradenton. I give names and where they are.

Q: Are these people that you purchase drugs from in the past?

A: Yes.

Q: Okay. And what types of drugs?

A: From crack, coke, pot, pills, pretty much covers it. And I'm -- they might have other dealings too.

Q: is this stuff that you purchased yourself, or just --

A: Some. Some I just met, some I've dealt with, some like I just driven people over to -- (unintelligible) --

Q: All right, I'll pass that on to the State Attorney's office and make them aware of that. I'm not in a position to offer you a deal or anything like that.

A: Right, I understand.

Q: Sit down around with a contract or something? Okay.

A: You guys -- it's not just about like a reduction of sentence, I just -- I don't want to go back out there and do drugs again when I get out. And if I get rid of my ways of going--(unintelligible)--I'm going to stay clean. It's not just about -- okay?

Q: All right. I will definitely let them know. Anything you want me to let your sister know or anything? I talked to her earlier today.

A: I'm going to give her a call here in just a little bit.

Q: Okay. And as far as the purse we're talking about, you're pretty sure it was thrown off the bridge.

A: Yes, and the bat too.

Q: And the bat. It was dark at the time you did this?

A: Yes, it was dark, it was morning time.

Q: Okay. Because we searched all weekend and we haven't found anything, and -- just -- we're trying to do the best we can to recover those items for your family.

A: Uh-huh.

Q: And any place else that you might have --

A: I don't think so. I've had some time to really think about everything, and I -- haven't thought of anywhere else that I could have thrown it at.

Q: Okay. You stop anywhere else that you can remember? Because I remember you saying that you drove out east.

A: Uh-huh.

Q: And that you turned around --

A: I turned around just before the interstate, like -- you know where that Exxon station is?

Q: Uh-huh.

A: I just turned around right there.

Q: Okay.

A: Like I didn't go in there or anything, I just turned around right there on State Road 70.

Q: Right.

A: Made a U-turn.

Q: Is that -- when you were throwing the bat towards town, is that when you stopped off at Sabal Cove?

A: No, I stopped off at Sabal Cove first.

Q: So you left your parents' house --

A: Went to Sabal Cove, turned around, headed out towards the interstate, turned around, headed to the bridge -- well, not the bridge, but I -- I headed down 301, 41, and then I went to the bridge. And I stopped near -- close to the top of it on the way over, and that's where I threw the stuff.

Q: Okay. And after you threw it, which -

A: I went back, I went down, and I turned around in Palmetto, and -- like in the grass, the first turn around place.

Q: Like by the -- (unintelligible) --

A: I didn't go down that far I don't think, I think I just turned around on the grass and headed back into town, in Bradenton.

Q: When you came back into town, which way did you go then to Erin's?

A: Um, I went -- I went -- I followed the thing -- I followed around by the mall, followed 41 around by the mall, and just went to 20th Street.

Q: Followed around past the mall where it turns into Cortez?

A: Where it turns into Cortez, and then I went to 20th Street.

Q: Okay. Any possibility that you might have taken your mom's purse inside Erin's house and put it anywhere?

A: Nope, positive on that. I didn't bring anything inside her house.

According to Defendant, Waldron knew Defendant likely had an attorney, and thus before starting the questioning he was required to advise Defendant of his right to counsel and to secure a written waiver of counsel signed by two witnesses.[183] He also argues that Waldron's contact with Defendant came "on the heels" of the January 9th interview, he exploited information he learned on January 9th to question Defendant on January 12th, and he failed to honor Defendant's invocation of his right to remain silent on January 9th.[184]

The Court views the conversation on the 12th as two-tiered -- the conversation that occurred before Waldron read Defendant his rights, and what occurred after. As to the portion that occurred before, the Court grants Defendant's motion in part. Defendant signed an "Invocation of Constitutional Rights"[185] on the morning of January 12th.[186]

Q: Okay. What was --just out of curiosity, what was the purpose of taking it and then throwing it away?

A: I'd rather not answer that question.

Q: Okay, good enough. Anything else?

A: No.

Q: Okay, we're going to conclude this interview. The time is 3:12 p.m.

Vol. 7, pp. 799-804.

[183] Def.'s Br., p. 55.

[184] Def.'s Br., p. 56.

[185] The "Invocation of Constitutional Rights" stated:

> The undersigned, having been advised that I have been arrested and charged with a crime, do hereby invoke my RIGHT TO REMAIN SILENT under the 5th Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

Furthermore, I do hereby invoke my RIGHT TO COUNSEL guaranteed by Article I, Section 16 of the Florida Constitution.

By invocation of my 5th Amendment RIGHT TO COUNSEL, under the Miranda and Edwards decisions, I intend this to be an absolute expression of my desire for the assistance of an attorney in dealing with any custodial interrogation by the police about this arrest or any other crime or criminal activity under investigation.

Therefore, I demand that no local, State or Federal police or prosecution personnel (including jail inmates acting at the request or direction of such personnel), attempt to engage me in any conversation whatsoever, concerning any crime or criminal activity, without first providing me an attorney and having that attorney present.

This Invocation of Rights shall not be deemed to have been waived by me unless an attorney has been provided to me, either retained or appointed, and I execute a written waiver of these rights, signed by myself and my attorney. Anyone violating this INVOCATION OF CONSTITUTIONAL RIGHTS will be subject to legal action for sanctions and/or damages.

I further demand that the original of this Invocation of Rights be filed in the Court having jurisdiction of this cause and copies be served on all local, State and Federal law enforcement agencies, including the State Attorney's Office, with instructions that they have no contact with me unless my attorney is present.

/s/ Blaine Ross 1-12-04

/s/ Beverly Ackerman 1-12-04 10:16 am

[186] Vol. 10, p. 11. Although Defendant signed this invocation on the morning of Monday, January 12th, the file stamp on the document shows that it was not filed with the clerk's office until the afternoon January 13th. Although it is not clear whether Waldron knew for a fact that Defendant had invoked his right to counsel, he assumed that he had been appointed an attorney.

The case law is clear: "once a defendant has invoked his . . . right to counsel, a defendant is no longer subject to police interrogation until counsel has been made available or the suspect initiates further communication with the police." *Jones v. State*, 748 So. 2d 1012, 1018 (Fla. 1999). *See Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981) (accused "having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*"). "If the suspect subsequently voluntarily initiates contact or communication with the police *and validly waives the right he . . . had previously invoked*, police interrogation can resume." *id* (emphasis added). *See Smith v. Illinois*, 469 U.S. 91, 95 (1984) (where accused invokes right to counsel, court may admit responses to further questioning where accused (a) initiated further discussions with police, and (b) knowingly and intelligently waived the right invoked). Initially, there is no question Defendant reinitiated contact with Waldron through his sister, and he clearly stated so.[187] *See Fitzpatrick v. State*, 900 So. 2d 495, 513 (Fla. 2005) (defendant's calling and leaving messages to speak with detective was a voluntary initiation of contact); *Jones v. State*, 748 So. 2d 1012, 1018 (Fla. 1999) (same); *Addison v. State*, 653 So. 2d 482, 483 (Fla. 5th DCA 1995) (although defendant previously invoked right to counsel and was represented by counsel, he initiated

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[187] Vol. 7, p. 804.

contact where detective was contacted by anonymous woman who told him that defendant wanted to speak with him, and testimony established that defendant told detective he initiated contact through his girlfriend).

The Court further finds that after Waldron arrived at the jail and before he re-advised Defendant of his rights, he did not actually subject Defendant to *interrogation* until he said "We looked around the past few days in the river, and we're not finding anything."[188] Waldron clearly made the statement with the likely goal of eliciting an incriminating response from Defendant. *See State v. Shell*, 932 So. 2d 628, 632 (interrogation takes place "when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed to lead to an incriminating response"). The reasonable goal of such a statement was to learn from Defendant either the exact location of where he threw the items, or whether he threw the items in another location. Thus, the Court grants the motion as to the following portion of the January 12th interview:

> Q: *** We looked around the past few days in the river, and we're not finding anything.
>
> A: Probably -- (unintelligible) -- I'm pretty sure that's where I threw the bat -- (unintelligible) -- other stuff probably floated away.
>
> Q: Your mom's purse was a pretty good-size purse -- (unintelligible) --

---

[188] Vol. 7, p. 797.

A: -- (unintelligible) --

Q: Pretty sure you threw that off there too?

A: Uh-huh.

Q: We didn't come up with anything. They had -- (unintelligible) Hillsborough County Sheriff's Office, Tampa Police Department, Sarasota County Sheriff's Office -- (unintelligible) -- looked in the river, around that bridge, a couple hundred yards each direction, and -- (unintelligible) -- nothing, you know the purse had some straps on it, it should have hung up on something. They found cell phones that could have been tossed in there from a long time ago, even some credit cards and stuff. Nothing from your parents' house.

A: Um, that's where I threw it.

Q: Okay. You don't think you would have thrown it anywhere else or anything like that? Okay, the reason why I ask -- (unintelligible) --

A: I understand that.

Q: So your sister can have those. -- (unintelligible) --

A: -- (unintelligible) --

Q: -- (unintelligible) -- in the water yesterday -- (unintelligible) -- in the water Monday, and nothing, so we pretty much called it off. That baseball bat -- aluminum baseball bat, it's going to float, and -- (unintelligible) --

A: Yeah.

Q: We got a couple phone calls from people coming in who think they've seen it, and we checked those areas and -- (unintelligible) --

A: You think the baseball bat floats?

Q: They bobble.

A: Yeah.

After that discussion, Waldron re-read Defendant his rights, and the Court finds that he voluntarily, knowingly, and intelligently waived them.

However, Defendant argues that before Waldron could question him, he not only had to re-advise him of his *Miranda* rights, but had to "secure a written waiver of counsel signed by two witnesses.[189] There is no evidence that Waldron secured a written waiver during any part of the January 12th interview. Rule 3.111 of the Rules of Criminal Procedure provides that "a waiver [of counsel] made out of court shall be in writing with not less than 2 attesting witnesses." Fla. R. Crim. P. 3.111(d)(4). However, "[i]n gauging violations of rules of procedure, the courts of Florida generally have held that noncompliance does not require reversal unless it has resulted in prejudice or harm to the defendant such that fundamental rights are implicated. This rule only applies with greater force to purely technical rules like rule 3.111(d)(4)." *Randall v. State*, 691 So. 2d 573, 574 (Fla. 5th DCA 1997) (waiver of counsel signed by only a single attesting witness).

Even assuming Rule 3.111 applies here, the Court finds no prejudice. There is no question it was Defendant who initiated contact with Waldron

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[189] Def.'s Br., p. 55.

because he wanted to speak with him about information he had regarding local drug dealers he wanted to pass on to the State's Attorney. Once Waldron re-read him his *Miranda* rights, Defendant waived them saying "I'll talk to you but I'm not going to give you like information." It is clear to this Court that even if Waldron had presented him with a written waiver form and had it signed by two attesting witnesses, Defendant would have signed it and given the same information. He offered the information to benefit himself, as he wanted to use it to help reduce his sentence. The lack of a written waiver, therefore, did not prejudice or harm Defendant such that any fundamental rights were implicated. The Court therefore denies on this ground as to the portion of the January 12th interview following Defendant's readvisement of his rights.

Defendant also argues that Waldron's actions "caused [Defendant] to reasonably believe his statement . . . was in connection with plea negotiations," and that "[s]tatements made in connection with plea negotiations are inadmissible."[190] The Court denies the motion as to this ground as well. "To determine whether a statement is made in connection with plea negotiations, a court should use a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." *Owen v.*

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[190] Def.'s Br., p. 63.

Crosby, 854 So. 2d 182, 189 (Fla. 2003). "In applying the first prong, the trial court must carefully distinguish between the accused's admission and the accused's attempts to negotiate and plea bargain." *Richardson v. State*, 706 So. 2d 1349, 1353 (Fla. 1998). "Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations." *Owen*, 854 So. 2d at 189. Not only were these statements unsolicited, but Waldron specifically told Defendant he was "not in a position to offer you a deal or anything like that," to which Defendant responded "Right, I understand."[191] There was no indication that the State had a willingness to plea-bargain, or that Waldron was in a position to do so.

The same can be said for Defendant's argument that his statements were involuntary because they "were unlawfully induced by promises of leniency" made by Waldron.[192] Waldron made absolutely no promises to Defendant, and in fact told him that "all [he could] do [was] get some information from you to the State Attorney's office," and that he was "*not* in a position to offer [him] a deal or anything like that."[193] In addition, even assuming, *arguendo*, that Waldron did make a promise, there is no evidence that such a promise *induced* Defendant

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[191] Vol. 7, p. 801.

[192] Def.'s Br., p. 62.

[193] Vo. 7, pp. 796, 801.

to make those statements. Defendant initiated his contact with Waldron for the specific purpose of giving him this information, in the hopes that it would help his position. The Defendant's motion is therefore denied as to this ground.

It is therefore:

ORDERED AND ADJUDGED that the Defendant's Motion and Amended Motion to Suppress Statements, Admissions, or Confessions is

GRANTED as to that portion of the January 12th interview as represented by Vol. 7, p. 797, line 4 to p. 798, line 16 of the record, and as such it is suppressed;

GRANTED as to that portion of the January 9th interview as represented by Vol. 7, p. 787, line 6 to p. 788, line 13, and as such it is suppressed.

DENIED as to all other grounds.

DONE AND ORDERED in Chambers, Bradenton, Manatee County, this 9th day of March 2007.

Edward Nicholas, Circuit Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing order was furnished by mail to **Carolyn DaSilva, Esq.**, Office of the Public Defender, 920 Manatee Avenue West, Suite 50, Bradenton, Florida, and **Arthur Brown, Esq.**, Office of the State Attorney, 1112 Manatee Avenue West, Sixth Floor, Bradenton, Florida 34205, on this 12 day of March 2007.

R.B. "Chips" Shore
Clerk of the Court

By: Barbara Wilger
Deputy Clerk

CHARLES B. WELLS
MANATEE COUNTY, FLORIDA **Sheriff**

515 11th Street West
Bradenton, FL 34205-7727
Telephone (941) 747-3011

Fax Numbers
Criminal Investigation Division (941) 748-5682
Administrative/Executive (941) 749-5401

CASE NUMBER: 04-1021 DATE: 01/09/04 TIME: 7:23 P.M.

WARNING OF CONSTITUTIONAL RIGHTS

1. You have the right to remain silent.
2. Anything you say may be used against you in a court of law.
3. You have the right to talk to an attorney and have him/her present with you while you are being questioned.
4. If you cannot afford to hire an attorney, one may be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

QUESTION: Do you understand each of these rights I have explained to you?

ANSWER: Yes

QUESTION: Having these rights in mind, do you wish to talk to us now?

ANSWER: Yes

Blaine Ross
SIGNATURE OF PERSON BEING QUESTIONED

[redacted] #00096
OFFICER ADVISING RIGHTS

St Ex. #12 5/13/06

MCSO FM 87-065 (rev 7/97)

An Accredited Agency

2 of 2

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Case No. 10-550

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2010

STATE OF FLORIDA,

Petitioner

v.

BLAINE ROSS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT OF FLORIDA
COUNSEL FOR RESPONDENT

STEVEN L. BOLOTIN
Assistant Public Defender
COUNSEL OF RECORD

Polk County Courthouse
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
(863) 534-4200

QUESTION PRESENTED

(AS FRAMED BY PETITIONER, THE STATE OF FLORIDA)

[Capital Case]

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEDGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBLITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT?

TABLE OF CONTENTS

	PAGE NO.
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. Florida Supreme Court's Findings	1
B. Facts Pertaining to Whether the Delay in Giving Miranda Warnings was a Deliberate Tactical Decision or an Inadvertent Mistake	3
C. Facts Pertaining to the Prewarning Interrogation	5
D. Facts Pertaining to the Midstream Miranda Warning	13
E. Continuity of Prewarning and Postwarning Interrogation, and Absence of Curative Measures	15
F. Florida Supreme Court's Finding that Ross' Miranda Waiver and Ensuing Confession Were Involuntary	17
REASONS FOR DENYING THE WRIT	19
SUMMARY OF ARGUMENT	19
I. WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBLITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT. [AS FRAMED BY PETITIONER, THE STATE OF FLORIDA].	21
CONCLUSION	33

TABLE OF AUTHORITIES

	PAGE NO.
Cuervo v. State, 967 So.2d 155 (Fla. 2007)	29-31
Davis v. United States, 512 U.S. 452 (1994)	22
Edwards v. United States, 923 A.2d 840 (D.C. 2007)	27,28
Miranda v. Arizona, 384 U.S. 436 (1966).	1-2,17-32
Missouri v. Seibert, 542 U.S. 600 (2004)	19-23,25-28,32
Oregon v. Elstad, 470 U.S. 298 (1985)	19-22,25-26
Rhode Island v. Innis, 446 U.S. 291 (1980)	31
United States v. Gonzalez-Lauzan, 437 F.3d 1128 (11th Cir. 2006)	31-32
Washington v. Sobina, 509 F.3d 613 (3d Cir. 2007)	29

STATEMENT OF THE CASE

A. Florida Supreme Court's Findings

In its opinion below, the Florida Supreme Court found that "[T]he police, over a period of several hours of custodial interrogation, deliberately delayed administration of [Miranda] warnings, obtained inculpatory admissions, and when the warnings were finally administered midstream, minimized and downplayed the significance of the warnings and continued the prior interrogation - all of which undermined the effectiveness of Miranda"[1] [State's Appendix A2]. Based on the totality of the circumstances, including Detective Waldron's own testimony concerning his consultation with his supervisors prior to the interrogation, the Florida Supreme Court concluded "that rather than merely making a good-faith mistake, the police used improper and deliberate tactics in delaying the administration of the Miranda warnings in order to obtain the initial statement" [A50, see A8,49-50]. The Florida Supreme Court also concluded that when the Miranda warnings were eventually and belatedly given (after several hours of accusatory interrogation which yielded "multiple inculpatory statements", A2) "under the totality of the cir-

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

cumstances, the waiver of the defendant's rights against self-incrimination was not voluntary, knowing, and intelligent, and the [postwarning] statements were not voluntarily given" [A2,A65]. Regarding the issue of whether psychologically coercive tactics were used to obtain Ross' prewarning and postwarning statements, the Florida Supreme Court wrote:

> ...[T]he danger of police engaging in the type of tactics exhibited in this case is not only that the prophylactic purpose of Miranda is undermined but that the confession itself is unreliable. Dr. DeClue, Ross's false confession expert, explained the factors that increase likelihood of false confessions, many of which were present in Ross's case, such as increasing the pressure, exaggerating evidence, challenging a person's memory, continuing an interrogation for a lengthy amount of time, showing photographs of the crime scene, and using isolation. The very fact that Ross confessed that he might have taken his mother's jewelry when in fact the evidence reveals that Kathleen Ross herself had actually taken the jewelry from her house and placed it in her mother's house highlights this danger. [A64]

Finally, the Florida Supreme Court repeatedly emphasized that its conclusions were based not only on federal constitutional protections but also on the Florida Constitution and on Florida jurisprudence which pre-existed Miranda by over half a century (A2,15,17-18,31,40,65).

B. Facts Pertaining to Whether the Delay in Giving Miranda Warnings was a Deliberate Tactical Decision or an Inadvertent Mistake

Detective Waldron testified in the suppression hearing that he believed that this session would be his last chance to interrogate Blaine Ross. Unlike the earlier sessions (which were audiotaped), the January 9 interview was conducted in a small, windowless second-floor room equipped with a video camera mounted high on the wall. Asked about the decision to change rooms, Waldron said he reasonably assumed he could only interview Blaine one more time before he might ask for an attorney. "So it was determined that this would probably be the only opportunity we might have to question him about the details of the case". Recognizing that "this interview could be key, we wanted to have it audio and video recorded". Waldron acknowledged that under his own sheriff's department's general orders (of which he was aware at the time of the interrogation) he was required to give Blaine Miranda warnings before accusing him of a crime or confronting him with evidence pointing to his guilt. [The defense introduced Manatee County Sheriff's Office General Order #1027, promulgated by Sheriff Charles B. Wells, which specifies that "Constitutional Rights Warnings are required before questioning" when a suspect is arrested or when "[q]uestioning passes from the fact-finding process to an accusatory stage". However, Waldron did not believe that his

interrogation of Blaine was in violation of his own department's orders because "General orders are a guideline to follow, and there are times where, in certain circumstances you have to go outside of those guidelines, and in these particular circumstances, you know, I discussed with my supervisors, was told and even given suggestions of how to proceed, and even the Sheriff himself, when I conducted the last interview, had told me how he thought things should go". Before the January 9th interrogation, Sheriff Wells told Waldron "he was counting on me to get closure on this, and that he trusted my judgment, and wished me luck". Asked by defense counsel whether Sheriff Wells specifically told him to violate the department's general orders, Waldron replied "No, he didn't, but he was there the entire time this took place, and if there was a problem with what I was doing any one of the supervisors could have stepped in and...stopped what I was doing, and that never happened". According to Waldron, Sheriff Wells and many other people were in another room viewing the monitor while the videotaped interrogation was occurring. [See Opinion of Florida Supreme Court, A8, 43-44, and Detective Waldron's suppression hearing testimony at Respondent's Appendix B3-6].

C. Facts Pertaining to the Prewarning Interrogation

During the January 9 interrogation, more than two hours before Miranda warnings were eventually given, Detective Waldron confronted Blaine by asserting that blood tying him to the murder of his parents had been found. [This is the point where the Florida Supreme Court determined the interrogation became custodial. (A28, A68). Even the dissenting Justices agreed that everything which followed was custodial interrogation (A71, n.32). Nor does the state claim otherwise in its petition for certiorari]. Waldron asked, "Blaine were you upset with your mom?" They discussed the impending divorce, and Blaine admitted that he was angry at his dad for cheating. Waldron asked him point-blank if he killed his father; Blaine said "No". Waldron asked him if he killed his mother, and he said "No". Waldron said, "Well, Blaine, I don't believe that. And I'll tell you why. Blood was found on a pair of your pants, that matches the crime scene"[2]. When Blaine persisted in denying that he killed his parents, Waldron said, "Okay, but the blood doesn't lie, the evidence doesn't lie."

For the next five minutes on the videotape, Waldron's voice, manner, and body language are louder, angrier, more belligerent

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[2]Waldron had information at the time that the blood on the pants had tested as human blood, but he had no information indicating that it matched the blood from the crime scene.

and aggressive than when it was gradually building up to this point:

> And I'm telling you right now, you're bringing yourself down, but you're also bringing down a 16-year-old girl and your best friend. Okay? Because they have lied to try to help you out. That blood on those pants that were yours, that were at Erin's house, do not lie. You've brought Erin into this, and you've brought Mikey into this.
>
> You lied to your sister, you've lied to your grandmother, you've lied to your aunt, you've lied to your family. Now is the time to be truthful and be a man about this and tell us what happened and why. Well, we know the what happened, but why. Why, Blaine. Why go to this extent. Why be so upset and angry that you'd do this.
>
> BLAINE: I didn't, and I don't know - -
>
> WALDRON: How did the blood get on your pants?
>
> BLAINE: I don't know of the pants you're speaking of.
>
> WALDRON: A pair of black pants.
>
> BLAINE: A pair of black pants.
>
> WALDRON: And you were seen wearing those black pants on Tuesday.

[In fact, no witness saw Blaine wearing those pants that night. Asked during the suppression hearing if he made that up, Waldron said, "I might have."]

> BLAINE: Okay. Um, well, I do have a pair of black pants, they're like Dickies.
>
> WALDRON: That's right. Those pair of black Dickies have blood on them.
>
> BLAINE: I do not know how it got there.

WALDRON: I know how that blood got there, Blaine. When you brutally, cold-blooded beat your parents to death, when you smashed in their heads and beat them to death.

[When he says "smashed in their heads and beat them to death", Waldron is yelling at Blaine. The rest is said slowly and emphatically, leaning toward Blaine's face].

BLAINE: I - -

WALDRON: And then you took that rope that was in the garage and you put it around your mother's neck, and you put it around your father's neck, and you slowly methodically cold-bloodedly pulled it tighter and tighter and tighter, Blaine. After smashing in their heads. That's how you got that blood on your pants, those black Dickies that you were wearing Tuesday.

BLAINE: No.

WALDRON: Yes, Blaine.

BLAINE: I - -

WALDRON: Blaine - -

BLAINE: I'm - -

WALDRON: Blaine, you can't dispute the blood that's on those Dickies. The lab has already tested it.

BLAINE: Okay.

WALDRON: Okay? There's no other way that blood would have got on there. That blood got on there when you beat your parents to death.

(emphasis supplied.)

Later:

WALDRON: And you brought all your clothes over to Erin's house so that Erin could wash them. And Erin washed all of your clothes Tuesday morning - - I mean Wednesday morning, according to you. But the thing that she forgot

to wash were those black Dickies that had blood on it from killing your parents.

BLAINE: No.

WALDRON: Yes. Yes, Blaine.

BLAINE: I didn't kill my parents.

WALDRON: That's the only way that blood would have gotten on there, Blaine. You weren't wearing those pants in there when you discovered - - when you called 911, so we know the blood didn't get on there that way. But that blood was on there from when you killed your parents. And it's not just one spot, Blaine. The way your parents were killed, that you killed them, was with so much rage, so much anger - -

BLAINE: I - -

WALDRON: And you even told the lady at the bank that your mom was out of town, knowing full well that there was no way the bank could call your house and talk to your mom.

BLAINE: I don't remember telling that lady -

WALDRON: You don't remember much at all, okay? And from what you do supposedly remember, has all been lies, because we've been able to verify it. You drug in Erin. You want to see Erin go to prison now? Mikey go to prison? Is that what you want? You want to bring all these people down with you? For what you did? The time is now to be a man. And the evidence doesn't lie.

[By this time Blaine, in his chair in the corner, is hanging his head down].

BLAINE: I don't know how blood got on those black Dickies. I was not - -

WALDRON: I do know how. There's only one way that blood could have gotten on there.

BLAINE: And I - - I didn't kill my parents. And I'm not trying to bring anybody down with me

[It is now 5:30 p.m. Blaine has still not been advised of his Miranda rights, nor will he be for another two hours].

At this point, Waldron says "Blaine, you are"; his aggressive demeanor subsides and his tone appears compassionate:

> Blaine, is it possible that when this happened, because of how it happened and what happened, that you don't remember? That you're blocking part of this out? Blaine, I know - - help me out here.

Waldron said, "Blaine, I know it's hard", and when Blaine reiterated that he didn't kill his parents Waldron brought out the crime scene photographs again and said, "Blaine, look at these. These are your parents. Is this how you want them to be remembered?". Then, "Tell me the truth. Blaine, I'm going to have to walk out of here and tell your sister what I know...." Waldron shows Blaine the photos again and says, "Is that how you want your sister to remember this?".

Waldron went back to asking Blaine if it was possible he blocked it out and couldn't remember. Blaine made it clear that he was not saying he killed his parents, but there was a possibility, "with the information that I have been given" and in view of his inability to remember the time sequence, "it is a possibility that I could have done this and not remembered". Blaine asked Waldron "[d]oes that make sense?" and Waldron replied, "That does make sense.... Blaine, that is the most sense that you've told me that

you have made out of this". Blaine, almost crying, repeated "I didn't kill my parents".

Waldron said, "But Blaine, you were so upset...maybe you didn't mean to, I'm sure you didn't mean to. I think maybe something snapped that you don't remember, that you had no control over". Blaine asked "Does that happen?", and Waldron assured him it does. Waldron continued in this vein; Blaine is a young kid, he was upset with his dad, things just got to the breaking point, you lose control "and by the time you realize what's happened, you can't go back and change it." Waldron (using what he acknowledged in the suppression hearing is known as the "lifesaver technique") told Blaine, "I'd rather be able to tell your sister that this was all a horrible accident..."

At 5:45 p.m. (more than an hour and a half before Miranda, Blaine said to Waldron, "Can I ask you a favor?" "Sure". "Can we go smoke a cigarette?" Waldron replied, "We can smoke one in here". Blaine said, "Okay. I was going to say we could - - you can handcuff me to yourself to make sure I wasn't gonna run."

[For all of their previous breaks, Blaine and Waldron went downstairs and outside the building. Waldron explained in the suppression hearing, "We were...in a different part of the building" on January 9. However, when they had taken a smoke break an hour and half earlier on January 9 they had gone outside. When Blaine said "You can handcuff me to yourself to make sure I wasn't going

to run", Waldron did not tell him he was free to leave or that he was free to go outside on his own, "because once again he's making a statement, he's not asking a question"].

Waldron moved a trash basket and told Blaine to "[p]ut your ashes in here". For the remainder of the interview, when he smoked, he used that receptacle or a paper or plastic cup.

Blaine said to Waldron, "you could be right, and that's what I'm scared of." Waldron said, "Well, Blaine, I don't think it's a matter of I think you're right, I think it's pretty much what happened". "Sometimes traumatic things happen, and we tend to block those things." Blaine, his voice breaking, said, "I'm scared". Waldron asked him if he washed up in his parents' bathroom afterwards, or if he went someplace else and washed up, "[b]ecause I think if you had gone back to Erin's house and washed up it would be pretty obvious." He asked Blaine if he changed his T-shirt or if he gave Erin the baseball bat. Blaine said, "You're making me question myself". Blaine again reiterated "I didn't do this", but - - as a hypothetical situation - - he didn't remember cleaning up or changing clothes or getting rid of a bat. Waldron asked him if he remembered being mad and upset at his dad, and Blaine answered that he did. Waldron said, "It was just getting to the point where you exploded. I don't think you intended to hurt your mother".

When Blaine repeated, "I don't think I did this", Waldron got him to acknowledge (again) that it was possible. Waldron then as-

serted that it was more than just a possibility because of the blood on his pants, which put him at the crime scene. "Blaine, the only way you can put an end to this and to start making things right is to tell me what you remember about that".

BLAINE: I didn't go back there.

WALDRON: But Blaine, you did.

*** ***

BLAINE: I don't know, I don't know. I don't remember going back to my parents' house. I don't think I did. But you say you have a pair of my pants with blood on them, and that makes me question myself. Because I don't remember, I don't remember doing this, if I did it. And now I'm scared.

Later:

BLAINE: You made me dig inside and think about it, and you've also given me hard evidence that puts me at the crime. And - - I can't - - I can't - - I can't - - I can't remember if I did this or not. I don't know. I mean, you have solid evidence, blood on my pants and everything, and I don't remember doing this, if I did it. And you're right, I did foul things up, and I have exploded before, and I - - that story that I told you about punching the wall, I don't remember doing that, but when we came home it was there. And I had gone inside, and I - - (unintelligible) - - like my mom said. I'm pretty sure my sister will remember it too, I don't know.

WALDRON: This time something very similar happened, didn't it.

BLAINE: I don't know. Because I don't remember punching the wall, and that's the only thing that I can compare this to, is not remembering what I did whenever I was mad, when I was upset. I think - - this is the scary part, now I think that I did do it.

WALDRON: The evidence doesn't lie, Blaine.

BLAINE: I don't remember.

WALDRON: I know you didn't mean to.

BLAINE: If I did, I didn't mean to.

WALDRON: I know you didn't mean to.

(emphasis supplied)

The pre-warning interrogation continued in the same vein for another hour and a quarter, interspersed with a brief visit Ross was allowed to have with his sister. [As the Florida Supreme Court noted, Ross was not permitted to talk to her outside the interrogation room; she was brought in to him, A25].

D. Facts Pertaining to the Midstream Miranda Warning

At about 7:20 p.m. Waldron said to Blaine in an offhand manner:

> There's a couple of things that I need to go over with you real quick. There's a couple of things I discovered, and before we go any further I want to cover this with you, it's just a matter of procedure, um, based on everything we're talking about.

(emphasis supplied)(see Florida Supreme Court's opinion, A2, 53, 57-58).

Blaine asked if he was being arrested, and Waldron replied, "Nope. At this time you and I are talking, okay? And I would like to talk to you some more. But before I do, I need to go over

this". Waldron then - - for the first time - - read Blaine his Miranda rights; including "[y]ou have the right to remain silent" and "[y]ou can decide at any time to exercise these rights and not answer any questions or make any statements". Asked if, having these rights in mind, he wished to talk with the detective now, Blaine hesitated, and then said:

> I want - - I'd really like to talk to my sister, and since she's not here - -
>
> WALDRON: We tried to get in touch with her to get her back here.
>
> BLAINE: I don't know what I'm going to do. I don't know what's going to happen, and - -
>
> WALDRON: Well, I'm willing to talk to you if you want. We're trying to get in touch with your sister now so - - you're indicating that you do want to talk to me; correct?[3]
>
> BLAINE: Yes.
>
> WALDRON: Okay, if you would, please sign right there.

Shortly after Blaine signed the waiver form, Waldron expressed empathy; as human beings we all make mistakes, lose our tempers, hurt people we don't mean to. "But I do know what the evidence is that we have, and that evidence tells a story, and it's a story that cannot be changed or made up or misconstrued or

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[3]At trial, Waldron was asked about his statement that he was trying to find Blaine's sister. She was no longer with the victim advocate, and "To the best of my knowledge she was not in the building. I don't know what efforts were made, if any. I personally wasn't making any efforts."

misunderstood". Blaine (appearing to be crying, hands over his eyes) said in a very weak voice, "Well, I told you - - you - - you're right, about a lot of things. I, I, I don't think I did this. I don't know...." Waldron replied, "I know you say you don't think you did this, but there's the blood on your pants. This wasn't a burglary, somebody who broke into that house".

After fourteen seconds of silence, Blaine - - while shaking his head negatively from side to side at least 10-12 times, and in a broken voice - - said to Waldron, "I don't think I can help you any more. I don't think I have anything else to say." After another pause, Waldron said "Gotta make this right, Blaine." [See opinion of Florida Supreme Court, A56-57 and n.27, considering Ross' statement and Waldron's response "as part of the totality of the circumstances as to whether Ross' [Miranda] waiver was voluntary, knowing and intelligent"]. The interrogation continued apace.

E. Continuity of Prewarning and Postwarning Interrogation, and Absence of Curative Measures

When Ross was belatedly Mirandized, no curative measures were taken. As stated by the Florida Supreme Court:

> ...[R]ather than informing Ross that his prior admissions could not be used against him, Detective Waldron did the opposite, reminding Ross about everything that happened that day and that there were "a lot of things that [Ross] admitted to now." Detective Waldron continued his prior questioning without any break from

> the prewarning interrogation, playing on the same themes and using the same tactics as earlier. Based on the tactics used and the fact that Detective Waldron reminded Ross about his admissions immediately after providing him with his Miranda warnings, Ross would likely have had the misimpression that his prior incriminating statements could be used against him.

(A59;see A52-53,55-56,60,63-64).

The Florida Supreme Court also found that there was no meaningful break between the pre-warning and post-warning interrogation; the whole thing was conducted by Detective Waldron in the same small room which Ross was never allowed to leave. The questioning was treated as continuous, the content overlapped, and Waldron repeatedly reminded Ross of his prior admissions (see A10,55-56,59,62-65). For example, shortly after the Miranda warnings were read:

> ...the interview turned back to their prior discussion. Detective Waldron reminded Ross of his prior statements as follows:
>
> > Like I was saying before, earlier, there's a lot of things that happened today, and there's a lot of things that have come at you, and a lot of things that you've admitted to now, that you've kept bottled up inside before, hidden, that you're now having to deal with. I know this is very difficult. I do know that you loved your parents.

[Emphasis in Florida Supreme Court opinion].

> Detective Waldron continued his prior line of questioning that was established before the warnings without any break in the interrogation. He asked many of the same or similar questions. He played on the same themes and employed many of the same techniques...

(A55-56)

F. Florida Supreme Court's Finding that Ross' Miranda Waiver and Ensuing Confession Were Involuntary

The Florida Supreme Court found not only that Detective Waldron pursued a deliberate two-step strategy to circumvent Miranda [A2,50], but also - - due to the various improper tactics used - - that Ross' waiver of his Miranda rights and his ensuing confession were involuntary [A2,65]. Discussing the state Constitution and jurisprudence, the Florida Supreme Court wrote:

> Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. U.S. Const. amend. V; art. I, § 9, Fla. Const; see also Traylor v. State, 596 So.2d 957, 964 (Fla. 1992) (stressing that under the basic contours of Florida's constitutional privilege against self-incrimination, "a main focus of Florida confession law has always been on guarding against one thing-coercion"). Based on these federal and state constitutional guarantees, if a defendant confesses during a custodial interrogation, in order for the confession "to be admissible in a criminal trial, the State must prove that the confession was not compelled, but was voluntarily made." Ramirez v. State, 739 So.2d 568,573 (Fla. 1999).
>
> (A15)
>
> *** ***
>
> As this Court has recognized, "[t]he protections enunciated in Miranda have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution." Ramirez, 739 So.2d at 573; see also

Traylor, 596 So.2d at 964-66. Traylor explains the contours of our state constitutional law:

> The basic contours of Florida confession law were defined by this Court long ago under our common law. We recognized the important role that confessions play in the crime-solving process and the great benefit they provide; however, because of the tremendous weight accorded confessions by our courts and the significant potential for compulsion-both psychological and physical-in obtaining such statements, a main focus of Florida confession law has always been on guarding against one thing-coercion.... The test thus is one of voluntariness, or free will, which is to be determined by an examination of the totality of the circumstances surrounding the confession.

(A17-18)

In assessing the totality of the circumstances in Ross' case, the Florida Supreme Court observed:

> As we explained, the danger of police engaging in the type of tactics exhibited in this case is not only that the prophylactic purpose of Miranda is undermined but that the confession itself is unreliable. Dr. DeClue, Ross's false confession expert, explained the factors that increase likelihood of false confessions, many of which were present in Ross's case, such as increasing the pressure, exaggerating evidence, challenging a person's memory, continuing an interrogation for a lengthy amount of time, showing photographs of the crime scene, and using isolation.

(A64).

The Court also noted that Ross "was only twenty-one at the time with no indication of any prior experience with the criminal justice system" (A64).

The Florida Supreme Court held that the state failed to meet its burden of proving that Ross voluntarily, knowingly, and intelligently waived his Miranda rights, or that his ensuing statements were voluntarily given (A65):

> When the Miranda warnings are purposely delayed after hours of custodial interrogation, when Miranda warnings are given in such a way as to minimize and downplay their significance, and when the postwarning interrogation is treated as a continuation of the prewarning interrogation, the risk is that the suspect will not understand the rights and the consequences of waiving the rights. The risk is that the very purpose of Miranda is undermined and that the warnings will not function effectively as Miranda requires.

(A65).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Contrary to Petitioner's main assertion, the Florida Supreme Court did not "conflagrate" (cert. petition p.13)[4] or "improperly commingle" (p.15,19,23) the relevant factors from Missouri v. Seibert, 542 U.S. 600 (2004)(plurality opinion); Seibert, 542 U.S. at 618-22 (Kennedy, J., concurring); and Oregon v. Elstad, 470 U.S. 298 (1985). Instead, the Florida Supreme Court's findings as to (1) the deliberate strategy undertaken by

[4] Petitioner probably means "conflate", since the Florida Supreme Court did not set Seibert and Elstad on fire.

Detective Waldron and his supervisors to circumvent Miranda; (2) the hours of confrontational accusatory interrogation without Miranda warnings which produced multiple inculpatory admissions; (3) the psychologically coercive techniques used; (4) the absence of any curative measures when the warnings were belatedly given; (5) Waldron's minimizing and downplaying of the Miranda warnings; (6) the continuity of the prewarning and postwarning interrogation (including Waldron's repeated reminders to Ross of what he'd already admitted to); and (7) the involuntariness under the totality of the circumstances of Ross' waiver of his Miranda rights and his ensuing postwarning statements make it clear that the Florida Supreme Court correctly determined that Ross' statements were inadmissible under any standard; Seibert (plurality), Seibert (Justice Kennedy's concurrence), Elstad, as well as Florida constitutional and decisional law.

Since Detective Waldron's interrogation of Ross fails to meet any constitutional standard, this is not a case in which to decide which of the standards he violated is controlling.

I.

WHETHER THE PROVISION OF COMPLETE AND ACCURATE MIRANDA WARNINGS DURING A CUSTODIAL INTERROGATION, ACCOMPANIED BY A WRITTEN ACKNOWLEGMENT AND WAIVER, AFFORDS A PRESUMPTION OF ADMISSIBLITY OF POST-WARNING STATEMENTS WHERE THE INITIAL, PRE-WARNING STATEMENTS WERE NOT COERCED BUT WERE VOLUNTARILY PRODUCED AND WHERE THERE IS NO EVIDENCE OF POLICE MISCONDUCT.

[AS FRAMED BY PETITIONER, THE STATE OF FLORIDA].

The Question Presented for Review, as framed by the State of Florida, is inaccurate at best, deceptive at worst. The findings of the Florida Supreme Court on the mixed questions of law and fact - - and the evidence (including Detective Waldron's own acknowledgments [see Respondent's Appendix B, p.3-6]), introduced during the six-day suppression hearing preceding this capital trial - - overwhelmingly show that Ross' multiple pre-warning and postwarning inculpatory admissions were the product of (1) a deliberate two-step strategy undertaken by Detective Waldron, with the express or tacit approval of his supervisors, to circumvent 21 year old Blaine Ross' Miranda rights, because they believed it would be their last chance to interrogate him before he might ask for a lawyer; (2) several hours of alternately heated and fake-sympathetic accusatory interrogation; and (3) psychologically coercive tactics likely to produce a false

confession. The evidence -- and the state Supreme Court's findings -- are replete with instances of police misconduct and coercive techniques. As for the (eventual) "provision of complete and accurate Miranda warnings" referred to in Florida's "Question Presented", Detective Waldron may indeed have read all the words, but petitioner omits the crucial facts (under Justice Kennedy's concurring opinion, as well as the plurality opinion in Missouri v. Seibert, 542 U.S. 600 (2004)) that (1) no curative measures were taken to advise Ross that his prewarning statements could not be used against him; (2) to the contrary, Waldron repeatedly reminded Ross of his prewarning admissions and asked him to expand on them; (3) Waldron downplayed and minimized the Miranda warnings, telling Ross they were "just a matter of procedure...based on everything we're talking about"; and (4) when Ross said to Waldron "I don't think I can help you anymore. I don't think I have anything else to say", Waldron (going further than Davis v. United States, 512 U.S. 452 (1994) permits, assuming arguendo that Ross' attempt to stop the interrogation could be called equivocal) replied "Gotta make this right, Blaine", effectively communicating to Ross that he had no choice but the continue. [See A56-57 and n.27].

The Florida Supreme Court did not confuse or improperly commingle the Seibert and Elstad opinions. The relevant factors to consider do overlap to a considerable extent (see A41 n.10).

The Florida Supreme Court was not unaware that there are differing views as to whether the Seibert plurality opinion or Justice Kennedy's concurring opinion is controlling (A37-38 n.9). As Ross stated in his brief:

> While some appellate courts have found or suggested that the plurality opinion in Seibert is the controlling or more persuasive authority [see State v. Pye, 653 S.E.2d 450,453 n.6 (Ga. 2007); Martinez v. State, 204 S.W. 914,918-20 (Tex. App. 2006); Crawford v. State, 100 P.3d 440,450 (Alaska App. 2004); State v. Farris, 849 N.E.2d 985,994 (Ohio 2006); United States v. Carrizales-Toledo, 454 F.3d 1142,1151 (10th Cir. 2006)], Florida courts - - in accord with the majority of federal circuits - - have concluded that the narrower concurring opinion of Justice Kennedy is the controlling authority. Davis v. State, 2008 WL 2277520 (Fla. 2008); State v. Pitts, 936 So.2d 1111,1135-36 (Fla. 2d DCA 2006); State v. Lebron, 979 So.2d 1093 (Fla. 3d DCA 2008); Jump v. State, 983 So.2d 726 (Fla. 1st DCA 2008). See United States v. Briones, 390 F.3d [610,613-14 (8th Cir. 2004)]; United States v. Stewart, 388 F.3d 1079,1090 (7th Cir. 2004); United States v. Mashburn, 406 F.3d 303,308-09 (4th Cir. 2005); United States v. Naranjo, 426 F.3d 221,231-32 (3rd Cir. 2005); United States v. Williams, 435 F.3d 1148,1157-58 (9th Cir. 2006); see also Cooper v. State, 877 A.2d 1095,1107 (Md. App. 2005); People v. Montgomery, 875 N.E.2d 671,677 (Ill. App. 2007).
>
> The instant case presents such a flagrant violation of the core principles of Seibert that Blaine's post-warning statements are inadmissible whether the Court uses the plurality's test, or Justice Kennedy's test, or a hybrid of the two.
>
> Since a police interrogator will rarely directly admit that he or his department deliberately used the question-first technique for the purpose of circumventing Miranda (although here Detective Waldron came pretty close to such an admission during his cross-examination), the appellate courts in Williams, 435 F.2d at 1158, and Montgomery, 875 N.E.2d at 677, stated that "[I]n determining whether the interrogator deliberately

withheld the Miranda warning, courts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the Miranda warning." In addition to the officer's testimony concerning his own subjective motivations, courts (in determining the question of deliberate circumvention) may consider some or all of the objective factors outlined in the Seibert plurality opinion, including "(1) the completeness and detail of the prewarning interrogation; (2) the overlapping content of the two rounds of interrogation; (3) the timing and circumstances of both interrogations; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first, and (6) whether any curative measures were taken." Williams, 435 F.3d at 1160; Montgomery, 875 N.E.2d at 677; see People v. Angoco, 2007 WL 951496 (Guam 2007)(applying Williams factors to determine whether "question-first" technique was deliberately used to undermine Miranda).

In the instant case, all of the objective factors weigh strongly in the direction of showing deliberate use of the "question-first" technique to circumvent Miranda. In powerful addition is the testimony of Detective Waldron concerning his thought processes and his preparation for the January 9th interrogation session: (1) he believed this would be his last chance to interrogate Blaine before he might ask for a lawyer; (2) he was aware of his department's general order requiring Miranda warnings before engaging in accusatory questioning, and chose not the follow it; (3) prior to the interrogation he had consulted with his supervisors, including the elected sheriff, as to how to proceed; (4) the Sheriff had told him he was counting on him to get closure on this; and (5) the Sheriff and many other officers watched the interrogation on a monitor, and nobody had a problem with what Waldron was doing or saw fit to intervene.

[Blaine Ross initial brief, p.56-58]

*** ***

...[B]ecause Detective Waldron's use of the "question-first" technique to procure Blaine's confession was so

> obviously strategic, this is not a case which turns on burden of proof or which Seibert test controls. Neither the plurality nor Justice Kennedy would condone the tactics he used, and none of the potentially curative measures suggested by either the plurality or Justice Kennedy were undertaken. Blaine's post-warning statements, like his pre-warning statements, were inadmissible under either or both of the prevailing Seibert opinions.
>
> [Finally, even if Seibert didn't exist or didn't apply, Blaine's post-warning statements would still be inadmissible, because of Detective Waldron's failure to honor his invocation of his right to remain silent [Part G], and because Oregon v. Elstad, 470 U.S. 298,317-18 (1985) does not support the admissibility of post-warning statements when the pre-warning statements were, in addition, the product of coercive interrogation [Part H]].

[Blaine Ross initial brief, p.59-60]

The Florida Supreme Court's opinion shows that the Court agreed with Ross' contention that Detective Waldron's "two-step" interrogation technique failed to meet the minimum constitutional requirements under any standard; Seibert (plurality), Seibert (Justice Kennedy) or Elstad. [While the Florida Supreme Court did not entirely accept Ross' argument regarding his invocation of his right to remain silent after the Miranda warnings were read (A56-57,n.27), the Court did agree with Ross that Detective Waldron used psychologically coercive tactics during the prewarning and postwarning interrogation which (in combination with all of the other circumstances) rendered his eventual waiver of his Miranda rights involuntary, and rendered his postwarning admissions - - prompted by Waldron's reminders of his prewarning admissions - -

unreliable and involuntary under state as well as federal law (A2,17-18,55-56,63-65). The Florida Supreme Court emphasized that even under the Elstad test, a postwarning statement is admissible only "absent deliberately coercive or improper techniques in obtaining the initial statement" (A42, n.11); while in Ross' case the Court found that Waldron (in addition to minimizing the significance of the Miranda warnings) used a variety of psychologically coercive techniques which undermined the reliability of Ross' prewarning and postwarning admissions (A64)].

Two of Petitioner's ancillary points were discussed by the Florida Supreme Court and should be addressed in the Brief in Opposition. First, Pettioner argues that "[i]t would be a stretch...to find that Miranda warnings were withheld in this case until a confession had been obtained, since no confession was obtained prior to the administration of the warnings" (state's petition for certiorari, p. 25). Petitioner claims the Florida Supreme "changed the trigger by reviewing for any 'improper and deliberate tactics in delaying the Miranda warnings'" (cert petition, p. 25).

However, neither the plurality opinion in Seibert nor Justice Kennedy's concurrence require a full prewarning confession followed by a full postwarning confession. Justice Kennedy's test - - which Petitioner insists is the sole controlling standard (cert petition, p. 14) - - states:

> When an interrogator uses this deliberate, two-step strategy, predicated upon violating Miranda during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific curative steps.

Missouri v. Seibert, 542 U.S. at 621 (Kennedy, J., concurring)(emphasis supplied).

The Florida Supreme Court correctly rejected the state's argument. The Court recognized that Detective Waldron obtained inculpatory admissions from Ross during the extended accusatory prewarning interrogation, and then - - reminding Ross of his earlier admissions - - obtained further damaging admissions during the postwarning session (A2,46,55-56,59,62-63).

An argument similar to that made by Petitioner was soundly rejected in Edwards v. United States, 923 A.2d 840 (D.C. 2007):

> As it relates to Justice Kennedy's test, the government makes two arguments that Seibert should not apply to these facts. First, the government maintains that Edwards' prewarning statement was not a confession. The government asserts that Detective Smith, though he initially set out on a two-step inquiry, did not ultimately "deploy the investigatory tactic...to undermine Edwards' Miranda rights in a calculated manner" because he Mirandized Edwards before he actually confessed. Second, while the government does not put it in these specific terms, it argues that Edwards' "masked man" story was not inculpatory and, therefore, was not "related in substance" to the self-defense statement. These arguments are unpersuasive.
>
> While Edwards' masked-man story may not have been a full confession, Edwards did admit that he had a motive to kill the victim (the "beef"), the means to kill the victim (the gun), and the opportunity to kill the victim (he was at the scene). Moreover, Detective Smith admitted that he Mirandized Edwards "because he

> had incriminated himself with the weapon." It is true that the Seibert court termed the statement in its case a confession and that much of the plurality's opinion, therefore, is couched in those terms. The plurality, Justice Breyer, and Justice Kennedy, however, all clarified that the issue was not merely about complete and integrated confessions, but about any statements obtained through a two-step interrogation process. See McCoy [v. United States, 890 A.2d 204, 208 (D.C. 2006)] ("The Supreme Court's recent holding in Missouri v. Seibert...establishes that when police purposefully use a 'question first, Mirandize later' interrogation technique, postwarning statements related to prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.")

923 A.2d at 949-50 (emphasis in opinion).

As recognized in Edwards, "Limiting Seibert to full confessions as the government urges would encourage police to withhold Miranda warnings at the beginning of interrogations and bring the suspect to the brink of confessing. Police could then use the prior admissions, whether inculpatory or purportedly exculpatory, to take the last small step to obtaining the confession." 923 A.2d at 850.

That - - as the Florida Supreme Court found - - is exactly the technique which Detective Waldron deliberately used in the instant case.

Secondly, Petitioner appears to argue, based on the dissenting opinion below, that the Florida Supreme Court did not accord sufficient deference (i.e., absolute and irrebuttable deference) to the findings of the trial court. [See petition for

certiorari, p.10, 21-22]. However, the amount of deference a state's highest court should pay on direct appeal to a state trial court's findings is a matter of state law. [Even in federal habeas corpus cases, "in the event of a conflict between the fact findings of the state trial court and the state appellate court, deference should be given to the version reached by the higher court"; to conclude otherwise would intrude upon important interests in comity and federalism. Washington v. Sobina, 509 F.3d 613,620 (3d Cir. 2007)]. As Ross stated the applicable standard of review in his initial brief:

> A motion to suppress a confession based on the Fifth Amendment and Article I, Section 9 of the Florida Constitution presents a mixed question of law and fact. While the trial court's findings of historical fact are accorded deference if supported by competent, substantial evidence, the application of the law to the facts is reviewed de novo. Cuervo v. State, 967 So.2d 155,160 (Fla. 2007). As the interrogation sessions were audiotaped, and in the case of the January 9th interview, videotaped, this Court can independently review them to assess whether the trial court's factual findings were based on competent, substantial evidence. Cuervo, 967 So.2d at 160. See also Almeida v. State, 737 So.2d 520,524 n.9 (Fla. 1999) and Dooley v. State, 743 So.2d 65,68 (Fla. 4th DCA 1999), recognizing that insofar as a ruling is based on a videotape or audiotape, the trial court is in no better position to evaluate such evidence than the appellate court.

As the Florida Supreme Court correctly observed, the trial court did not make a credibility finding that Detective Waldron's failure to provide Miranda warnings prior to his accusatory interrogation of Ross was inadvertent or that it was a good-faith mis-

take. (See A49-50 and n.21). Instead, the trial court wrongly concluded that "[t]here is no evidence that the detectives deliberately withheld Miranda until Defendant confessed" (A49, n.21) (emphasis supplied), which is more in the nature of a determination of evidentiary sufficiency (which is capable of review on appeal), not a finding of historical fact. Therefore, the Florida Supreme Court was well within its rights to conclude that - - contrary to the trial judge's opinion - - the evidence (including Detective Waldron's own admissions that he believed this would be his last chance to interrogate Ross before he might ask for a lawyer; that he was aware of his Department's general orders that Constitutional Rights warnings are required before questioning passes to an accusatory stage but "in certain circumstances you have to go outside of those guidelines"; and that he discussed how he planned to proceed with his supervisors including the elected Sheriff; as well as his conduct of the videotaped interrogation session itself) overwhelmingly showed that Waldron's decision to withhold Miranda warnings for several hours of intense accusatory questioning (producing multiple incriminating admissions) was deliberate and strategic.

[Even assuming arguendo that the trial judge's opinion could be construed as a factual finding, the Florida Supreme Court is empowered under state law to decide whether such finding was supported by competent, substantial evidence. Cuervo, 967 So.2d at

160. Here, the Court properly concluded that all of the evidence showed the contrary - - that Waldron's withholding of Miranda warnings was deliberate].

Finally, it should be noted that the trial judge relied heavily on United States v. Gonzalez-Lauzan, 437 F.3d 1128 (11th Cir. 2006) (Petitioner's Appendix, A150-152). The circumstances of Gonzalez-Lauzan are the polar opposite of Ross' case; there the federal appellate court expressed doubt as to whether the initial unwarned segment constituted an "interrogation" at all under Rhode Island v. Innis, 446 U.S. 291 (1980), but even assuming arguendo that it did, it clearly did not amount to deliberate use of an interrogation technique designed to undermine Miranda. That is because just before the interview commenced the officers gave Gonzalez-Lauzan an introductory admonition that "we are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from". The officers then described the evidence they had accumulated against Gonzalez-Lauzan, who mostly sat and listened, though he would occasionally blurt out a comment like, "I'm no mastermind", "I'm not the kingpin", or "I'm not the person." Three times during this portion of the session, the officers repeated that they were not asking questions and Gonzalez-Lauzan should just listen. When Gonzalez-Lauzan suddenly made an unsolicited statement, "Okay, you got me", the

officers immediately advised him of his Miranda rights "without first pursuing any questioning or obtaining any detail." 437 F.3d at 1130-31,1136-38. The officers testified in the suppression hearing that it was their intention from the beginning to give Miranda warnings before asking any questions. 437 F.3d at 1137. In addition, there was no hostility displayed by the police officers during the session.

Under those facts, it is hard to fault the Eleventh Circuit's conclusion that "[b]ecause the officers had yet to ask Gonzalez-Lauzan a single question" before the time they provided Miranda warnings, and because they had repeatedly informed him that he should just listen, there was no circumvention of Miranda and the warnings, when given, were adequate to accomplish their purpose.

The circumstances of Gonzalez-Lauzan and those in Blaine Ross' case are at opposite extremes of the Seibert continuum. There is no reason to grant Florida's petition for certiorari because Detective Waldron's interrogation of Ross involved multiple and ongoing constitutional violations, and the state cannot prevail under any standard which might be applied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully Submitted,

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